SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 766

MAX JAKOB,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM R. GLENDON
200 Park Avenue
New York, New York 10017
Attorney for Petitioner,
Max Jakob

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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MAX JAKOB,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which was entered in the above-entitled case on September 12, 1966.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, as yet unreported, is printed in Appendix B, pp. A-7–A-46.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 12, 1966 (Appendix D, p. A-61).

The order of Mr. Justice Harlan, dated October 8, 1966, granting the extension of time within which to petition for certiorari set November 11, 1966 as the final date for filing this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the failure of the prosecution to turn over relevant grand jury testimony of a government witness, such testimony containing inconsistencies with the testimony at trial, in and of itself constitutes reversible error.

   (a) Whether the procedure followed by the trial court of inspecting the grand jury minutes *in camera* to determine whether they are relevant to and inconsistent with the witness's trial testimony and then deciding whether the failure to produce them was prejudicial to the defense constitutes reversible error.

   (b) Whether it is reversible error on the part of the trial court to treat as "harmless error" the failure of the prosecution to turn over to a defendant relevant prior inconsistent grand jury testimony of witnesses for the prosecution.

2. Whether it was reversible error on the part of the trial court to treat as "harmless error" the failure of the prosecution to turn over to the defendant in the instant case relevant prior inconsistent grand jury testimony.

3. Whether comment upon Petitioner's failure to testify violated Petitioner's privilege against self-incrimination under the Fifth Amendment.

Constitutional Provisions and Statutes Involved

Involved herein are Amendment V to the United States Constitution; Section 3500, Title 18, United States Code; Section 2314, Title 18, United States Code; Section 2315, Title 18, United States Code; and Section 371, Title 18, Uniited States Code (Appendix A, pp. A-1–A-6).

Statement of the Case

Petitioner was convicted of participating in a conspiracy to steal, transport and dispose of securities valued at over $5,000 in interstate and foreign commerce in violation of Title 18, U. S. Code, Sections 2314, 2315 and 371, and of the substantive count of transporting such securities in violation of Title 18, U. S. Code, Section 2314. On December 16, 1965, Petitioner was sentenced to one year and one day on each of the foregoing counts, the sentences to run concurrently, and fined $10,000.

Petitioner's conviction was the result of a typical mass conspiracy trial, involving six defendants at its termination; the indictment named sixteen defendants and six other co-conspirators. The trial, the minutes of which extended to over 3,300 pages, lasted from October 18 until November 10, 1965. It resulted in conviction of Petitioner who it was alleged conspired to steal, transport and dispose of securities belonging to the New York brokerage house, Bache & Co., in interstate and foreign commerce and who it was further alleged transported stolen securities from New York, New York to Newark, New Jersey, such transportation having been undertaken as part of the conspiracy.

Much of the government's case rested on the testimony of defendants Dodge, Pomeranz, Sessler, Gladstone and Markowitz, who testified for the prosecution. Most of the government's case with respect to Petitioner rested on the testimony of Gladstone and Markowitz. The number of defendants, the nature of the offense charged, the number of witnesses and the length of their testimony in combination resulted in an extremely complex and involved trial.

The conspiracy referred to in the trial allegedly had its beginnings in November, 1961, when defendant Gordon Tallman told defendant Robert Dodge that he had access to and could obtain for disposal large quantities of negotiable instruments, and allegedly lasted until July 20, 1962, when defendants John Lombardozzi and Joseph G. Martinelli were arrested at the Robert Treat Hotel in Newark, New Jersey, in possession of stolen securities. According to the government's witnesses, Gordon Tallman, an employee of Bache & Co., over a period of time in late May and early June, 1962, stole approximately $1,000,000 of "blue chip" securities registered in that firm's name and turned them over to Robert Dodge for distribution and ultimate sale. The securities were then passed along to other members of the conspiracy for disposal. After two unsuccessful attempts to sell the securities through New York brokerage houses, some of the conspirators attempted to dispose of them at a meeting at the Robert Treat Hotel in Newark, New Jersey. This meeting, which had been engineered by the FBI, resulted in the eventual arrest of the conspirators.

After the trial, on December 3, 1965, the Assistant United States Attorney turned over to the trial judge certain prior grand jury testimony of a government witness, FBI Agent

Joseph McDonald, stating that it had been discovered in the government's files only after the trial was over. This testimony dealt with Agent McDonald's observation of Clott, an alleged Government informant, and Gladstone. Since Gladstone was the principal witness against Petitioner, it is clear that anything relating to Gladstone held great importance for Petitioner. The government said that it discovered this grand jury testimony in preparation for the trial of two other originally named defendants, Lekacos and Lavas (Appendix C, p. A-47).

Several counsel moved for a new trial on the basis of the belated production of this transcript.* The Court denied the motions for the new trials, but did direct the United States Attorney to deliver the grand jury testimony to the Clerk who was then directed to seal it and to keep it so sealed for possible use in any appeal.

Holding that *Jencks* v. *U.S.*, 353 U.S. 657 (1957) and 18 U.S.C. Section 3500 have no application to grand jury minutes, the trial court in the instant case followed the procedure approved by the Second Circuit in *United States* v. *Spangelet*, 258 F. 2d 338 (1958), saying with regard to Agent McDonald's testimony (Appendix C, p. A-52):

> "'[While portions of grand jury testimony do not relate to the subject matter of the trial testimony;] the balance of the grand jury testimony does so relate and if known at the trial would have been subject to the direction to turn over to counsel for the defendants, whether inconsistent or not. From my reading

* The trial court ruled that any objection raised by counsel for one defendant was to be treated as having been raised on behalf of all of the defendants.

of this balance of the grand jury testimony, there appears to be inconsistencies.' "

However, it found that no prejudice arose from the failure to turn over this material to the defense.

In discussing this point upon appeal, the United States Court of Appeals for the Second Circuit stated that it saw "no more than 'harmless error' in the Government's inadvertent failure to turn over F.B.I. Agent McDonald's grand jury testimony at trial." It approved of the trial court's determination that even if such inconsistency between McDonald's testimony before the grand jury and at the trial discredited the agent "'it wouldn't have the slightest effect on the verdict.'" (Appendix B, p. A-39).

In addition to the foregoing, during the trial the prosecution referred to Petitioner's failure to testify. The prosecution stated: "He [counsel for Petitioner Jakob] forgot to mention for instance, that William Gladstone testified, uncontradicted, that he, Gladstone, told Jakob on or about July 2—." Out of the hearing of the jury Petitioner's attorney immediately moved for the declaration of a mistrial on the ground that the prosecution made reference to the failure of Petitioner to take the stand. The court denied the motion for mistrial and undertook to rectify the situation by an instruction to the jury. Exception was duly noted.

Reasons for Granting the Writ

1. The decisions of the courts below in the instant case are directly in conflict with the decisions of the 6th Circuit Court of Appeals in *Bergman* v. *United States*, 253 F. 2d 933 (6th Cir. 1958), the 3rd Circuit Court of Appeals in *United*

States v. *Prince*, 264 F. 2d 850 (3rd Cir. 1959), and the 7th Circuit Court of Appeals in *United States* v. *Sheer*, 278 F. 2d 65 (7th Cir. 1960). A conflict between the Courts of Appeals was adverted to by the court below (Appendix B, p. A-40):

> "Although one court has suggested that the failure to produce prior statements of government witnesses is ground for reversal even in the absence of any demonstration of prejudice, *Bergman* v. *United States*, 253 F. 2d 933, 935 (6th Cir. 1958), we have declined to reverse where non-production could properly be classified as 'harmless error,' see *United States* v. *Kahaner*, supra at 473."

The heart of the conflict is whether the non-production of prior inconsistent statements of government witnesses can be dismissed as "harmless error," as was done in the instant case. The government failed to furnish defendants with certain prior grand jury testimony of FBI Agent Joseph McDonald. Both the District Court and the Circuit Court of Appeals recognized inconsistencies between Agent McDonald's testimony at trial and his grand jury testimony, and it is well established that it is error not to produce at trial such prior grand jury testimony. *U.S.* v. *Spangelet*, 258 F. 2d 338 (2d Cir. 1958); *U.S.* v. *Zborowski*, 271 F. 2d 661 (2d Cir. 1959).

In *Bergman* v. *U.S.*, *supra*, *U.S.* v. *Prince*, *supra*, and *U.S.* v. *Sheer*, *supra*, where the non-production of the materials in question was error under the mandate of the Jencks Act, 18 U.S.C.A. § 3500, it was held that it was not the function of the court to determine whether defendant was prejudiced by the failure to make available the relevant portions of prior materials.

Therefore, the conflict between the decision in the instant case and the three cases cited heretofore becomes apparent. In the instant case, the trial court and Circuit Court of Appeals held that error arising out of the failure to provide the defense with materials to which it is entitled can be cured by application of the "harmless error" rule. In the other three cases, the Circuit Courts of Appeals held that error arising out of the failure to provide the defense with materials to which it is entitled cannot be cured by application of the "harmless error" rule.

2. The decision of the court below is believed to be erroneous and the conflicting decisions of the 3rd, 6th and 7th Circuit Courts of Appeals correct. Moreover, the decision of the court below approves of an approach criticized by this Court in *Dennis* v. *United States*, 384 U.S. 855 (1966), and *Clancy* v. *United States*, 365 U.S. 312 (1961), therefore conflicting with those cases in principle.

In dismissing the failure to produce relevant material as "harmless error," the court runs headlong into the fundamental problem that it is in no position to foresee what effect upon the course of the trial the production of such materials might have had. As the Court stated in *Clancy* v. *United States*, 365 U.S. 312 (1961) at page 316:

> "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively. As we said in *Jencks* v. *United States, supra*, 667:
>
> 'Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast

> in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.' "

The difficulty with having the trial judge make a determination with respect to the prejudicial effect of a failure to produce relevant material is further stated in *Dennis* v. *United States*, 384 U.S. 855 (1966) at pages 874-875:

> "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

3. The question of the applicability of the "harmless error" rule to the failure of the prosecution to produce required materials in a criminal trial clearly is of importance in the administration of criminal justice. Moreover, further clarification of the procedure to be followed with respect to prior grand jury testimony of government witnesses is needed.*

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* The importance to be attached to problems relating to the production of prior statements of government witnesses becomes evident from a consideration of the frequency with which this Court has granted certiorari in cases involving problems arising in the aftermath of *Jencks* v. *United States*, 353 U.S. 657 (1957). Cases involving these questions in which certiorari has been granted are: *Dennis* v. *United States*, 384 U.S. 855 (1966); *Campbell* v. *United States*, 373 U.S. 487 (1963); *Clancy* v. *United States*, 365 U.S. 312 (1961); *Killian* v. *United States*, 368 U.S. 231 (1961); *Scales* v. *United States*, 367 U.S. 203 (1961); *Campbell* v. *United States*, 365 U.S. 85 (1961); and *Palermo* v. *United States*, 360 U.S. 343 (1959).

The decisions of this Court have gradually been defining when the defense is entitled to the production of relevant materials and the procedures to be followed with regard to such production. In *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959), the Court held that the right of a defendant to production of grand jury testimony is not absolute, but did not define the circumstances under which such a right would apply. In *Rosenberg* v. *United States,* 360 U.S. 367 (1959), this Court held that a failure to produce a letter written by a witness to the Assistant United States Attorney was not reversible error where the defense was *already in possession of the information* contained therein. In *Dennis* v. *United States,* 384 U.S. 855, 875 (1966), this Court held that the trial court should not become involved in extensive *in camera* proceedings to determine whether the grand jury testimony was inconsistent with the trial testimony but that the trial court's function is "limited to deciding whether a case has been made for production, and to supervise the process."

However, this Court has not definitely ruled upon the applicability of the "harmless error" rule to the failure to produce such materials. Such a determination is needed, because the application of the "harmless error" rule could well vitiate the policy of producing relevant materials established by this Court since *Jencks* v. *United States,* 353 U.S. 657 (1957), and the procedural safeguards developed with regard thereto. If, after the termination of the trial or after the materials are no longer useful during the trial, the Court can hold *in camera* proceedings and determine that the defendant was not prejudiced by the failure to produce the materials, as was done in the instant case, the

efficacy of defendant's right to the production of such materials is undermined. For, whether the trial court undertakes to weigh and examine such material during or after trial, the fact remains that, as this Court but recently held, "the determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis* v. *United States*, 384 U.S. 855, 875 (1966).

4. Even if this Court should determine that the "harmless error" rule can be correctly applied to the failure to produce relevant grand jury testimony, the courts below erred in applying it in the present case.

Both the trial court and the Circuit Court of Appeals found inconsistencies between Agent McDonald's trial testimony and grand jury testimony. The testimony in question dealt with Agent McDonald's observation of Clott and Gladstone. Failure to produce the grand jury testimony is unquestionably prejudicial to Petitioner even if the testimony in question does not mention him directly but deals with Gladstone and Clott. Since Gladstone was the principal witness against Petitioner, and since the theory urged by Petitioner's counsel was that Gladstone was implicating Petitioner falsely in order to minimize Gladstone's own role in the conspiracy, the testimony pertaining to Gladstone's activities was obviously of the highest importance to Petitioner.

Moreover, testimony concerning Gladstone's activities bore directly upon Petitioner's liability under the second count of the indictment. The prosecution's evidence indicated that Gladstone had been directly involved in the substantive offense of transporting the stock for which Peti-

tioner was convicted on the basis of his alleged membership in the conspiracy, under the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946). It cannot seriously be doubted that Petitioner was entitled to the testimony involving a co-defendant for whose acts Petitioner was held vicariously liable.

Prior testimony of Agent McDonald has an even higher order of importance than would appear on the surface. It is uncontradicted that Agent McDonald sat at the prosecution's counsel table during the trial in the full view of the jury and assisted the prosecution in making delivery of prior statements of government witnesses to defense counsel. He therefore testified not merely as a prosecution witness, but as if he was clothed with the asserted impartiality of the government itself. Any inconsistency, therefore, in that witness' testimony was one which the Petitioner should have had the opportunity to exploit.

5. The decision of the Circuit Court of Appeals in the instant case upon the comment on Petitioner's failure to testify is in apparent conflict with the decision of this Court in *Stewart* v. *United States*, 366 U.S. 1 (1961).

The prosecution, by commenting upon Petitioner's failure to testify, and the trial court, by drawing the jury's attention to this comment by an improper admonition relating to the comment, violated Petitioner's Fifth Amendment right not to testify.

During the summation the prosecution stated: "He (Gelb) forgot to mention for instance, that William Gladstone testified, uncontradicted, that he. . . ." After Petitioner's attorney objected to this comment, the court instructed the jury as follows (Appendix C, pp. A-59–A-60):

> "The Court: Members of the jury, tomorrow when I give you my instructions, I will have occasion to tell you a defendant has the absolute right not to testify and that you are not to draw any inference unfavorable to the defendant by his failure to testify. Now if Mr. Stillman's suggestion was designed—and I don't think it was; I certainly think it was unintentional—to ask you for an inference unfavorable to Mr. Jakob because the testimony to which he referred of Mr. Gladstone was uncontradicted, I will have to tell you to disregard it and to draw no such inference. We will cover it tomorrow in our instructions. That is enough for the present."

The prosecution's comment upon Petitioner's failure to testify was improper. *United States* v. *Curtiss*, 330 F. 2d 278 (2d Cir. 1964); *Ing* v. *United States*, 278 F. 2d 362 (9th Cir. 1960); *Milton* v. *United States*, 110 F. 2d 566 (D.C. Cir. 1940). The court's comment concerning this impropriety further aggravated it by assuring that the jury's attention was drawn to it and to the fact that Gladstone testified "uncontradicted," as a result of Petitioner's failure to take the stand. It is, of course, the probable interpretation of the given remark by the jury which determines whether it falls within the prohibition, *Knowles* v. *United States*, 224 F. 2d 168 (10th Cir. 1955).

The court below held that the instructions pertaining to Petitioner's failure to testify were proper. That holding sharply conflicts with the principles as to curative instructions laid down by this Court in *Stewart* v. *United States*, 366 U.S. 1, 9-10 (1961):

> "'The Government's final contention is that even if the error was prejudicial the conviction should be allowed to stand on the theory that the error was not

sufficiently prejudicial to warrant the granting of a mistrial and the defense made no request for cautionary instructions. One answer to this argument is to be found in the Government's own brief. For, in its argument regarding the possibility that the jury may not have been aware of the improper question, the Government stresses the fact that the question was not emphasized by any reference to it in the instructions to the jury. During the course of this argument the Government expressly recognizes that the danger of the situation would have been increased by a cautionary instruction in that such an instruction would have again brought the jury's attention to petitioner's prior failures to testify. Plainly, the defense was under no obligation to take such a risk. . . .' "

The procedure to be followed with respect to the Fifth Amendment rights of defendants in criminal actions not to testify should be clarified. It is submitted that no comment upon a defendant's failure to testify should be permitted, that any such comment should result in a mistrial and be reversible error upon appeal, and that such comment cannot be cured by a curative instruction drawing further attention to the comment.

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted the petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM R. GLENDON
200 Park Avenue
New York, New York 10017
Attorney for Petitioner,
Max Jakob

APPENDIX A

Constitutional Provisions and Statutes Involved

Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 371

CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Appendix A—Constitutional Provisions and Statutes Involved

18 U.S.C. § 2314

TRANSPORTATION OF STOLEN GOODS, SECURITIES, MONEYS, FRAUDULENT STATE TAX STAMPS, OR ARTICLES USED IN COUNTERFEITING

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person or money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an

obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87-371, § 2, 75 Stat. 802.

18 U.S.C. § 2315

SALE OR RECEIPT OF STOLEN GOODS, SECURITIES, MONEYS, OR FRAUDULENT STATE TAX STAMPS

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or

tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country. As amended Oct. 4, 1961, Pub. L. 87-371, § 3, 75 Stat. 802.

18 U.S.C. § 3500

DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the posses-

sion of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparattion for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

APPENDIX B

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 441—September Term, 1965.

(Argued June 20, 1966 Decided September 12, 1966.)

Docket No. 30345

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT EDWARDS, MAX JAKOB, JOHN J. LOMBARDOZZI and MILTON PARNESS,

Appellants.

Before:

WATERMAN, MOORE and KAUFMAN,

Circuit Judges.

Appeals from convictions for violating the National Stolen Property Act, 18 U. S. C. §2314, and conspiracy to violate 18 U. S. C. §§2314, 2315 (18 U. S. C. §371), after a trial before Wyatt, *J.*, and a jury in the United States District Court for the Southern District of New York.

Affirmed.

EDWARD S. FRIEDLAND, New York, N. Y., *for appellant Robert Edwards.*

STUART A. JACKSON, New York, N. Y. (Royall, Koegel & Rogers, Norman Ostrow, Guy C. Quinlan, John S. Hibschman and Rhys Evans, on the brief), *for appellant Max Jakob.*

EUGENE FELDMAN, New York, N. Y. (Jaffe & Feldman, Anne Gross Feldman, on the brief), *for appellant John J. Lombardozzi.*

MEREDITH HEMPHILL, JR., New York, N. Y. (Anthony F. Mara, on the brief), *for appellant Milton Parness.*

OTTO G. OBERMAIER, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Michael W. Mitchell, John E. Sprizzo, Assistant United States Attorneys, on the brief), *for appellee.*

KAUFMAN, *Circuit Judge*:

ROBERT EDWARDS,[1] Max Jakob, John Lombardozzi and Milton Parness appeal from their convictions for violating the National Stolen Property Act, 18 U. S. C. §2314, and

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[1] On May 19, 1966, Edwards' appeal was dismissed for failure to file his brief and appendix in accordance with the schedule previously set down by this court. On June 20, 1966, Edwards moved to vacate the dismissal, citing unusual circumstances which prevented his attorney from devoting his time to this case. Because of these circumstances, we vacated the dismissal of Edwards' appeal, accepted a belatedly filed brief (to which the government has responded) and considered Edwards' appeal on the merits.

conspiracy to violate 18 U. S. C. §§2314, 2315 (18 U. S. C. §371). After a three and one-half week trial before Judge Wyatt and a jury, sentences were imposed ranging from imprisonment for one year and one day to four years.[2] For the reasons set forth below, we affirm.

The indictment, filed on July 1, 1964, was in four counts. Count one charged 16 defendants, including the 4 appellants,[3] and 6 co-conspirators not named as defendants[4] with participation in a conspiracy which encompassed the transportation in interstate and foreign commerce of approximately $1,000,000. in securities stolen from Bache & Co. (Bache), a New York brokerage concern. Count two charged appellants and several other co-defendants with the substantive violation, 18 U. S. C. §2314, of transporting stolen securities from New York City to Newark, New Jersey. Counts three and four charged other substantive violations of 18 U. S. C. §2314 involving transportation of stolen securities from New York City to Miami, Florida

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[2] Edwards was sentenced to four years of imprisonment on counts one and two, the sentences to run concurrently. Jakob received concurrent sentences of one year and one day on counts one and two, and a $10,000 committed and consecutive fine on each count. Lombardozzi and Parness were each sentenced to four years of imprisonment on counts one and two, the sentences to run concurrently with each other, but consecutively to sentences then being served.

[3] Named as defendants were Robert J. Dodge, Alan J. Pomeranz, Robert Edwards, Leo I. Sagal, Milton Parness, Joseph G. Martinelli, Martin L. Carbone, Fred F. Sessler, Sheldon Lowe, Max Jakob, William B. Gladstone, Bert Markowitz, John J. Lombardozzi, Michael Lekacos, Michael Levas, John Doe, a/k/a Robert Francine.

[4] Named as co-conspirators but not as defendants were Francine Pomeranz, Gordon A. Tallman, Alan L. Fisher, Francis P. O'Neill, Isidore Gorlitsky and Benjamin Clott.

and from New York City to Denver, Colorado but, prior to and at trial, these counts were dismissed on the government's motion.[5]

Much of the government's case rested on the testimony of defendants Dodge, Pomeranz, Sessler, Gladstone and Markowitz[6] who testified in its behalf. Viewing, as we must on appeal, all the evidence presented and the reasonable inferences flowing therefrom in the light most favorable to the government, *United States* v. *Kahn*, —— F. 2d —— (2d Cir. 1966); *United States* v. *Robbins*, 340 F. 2d 684 (2d Cir. 1965); *United States* v. *Kahaner*, 317 F. 2d 459, 467 (2d Cir.), *cert. denied*, 375 U. S. 836 (1963), a mosaic of cunning and nefarious crime emerges. In order to avoid obfuscating the rather involved facts, it is useful, before presenting a detailed review of the evidence, to summarize the government's case and to outline in skeleton form the manner in which the alleged conspiracy operated and the way in which each appellant was implicated in the substantive and conspiracy counts.

The first link in the alleged conspiracy chain was Gordon Tallman, an employee of Bache, who, over a period of time, stole approximately $1,000,000 of "blue-chip" securities registered in the firm's name and turned them over to Robert Dodge for distribution and ultimate sale. Dodge passed these securities to Alan Pomeranz who, in turn, gave them to Robert Edwards. During June and July

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[5] Only the four appellants and three co-defendants, Martin L. Carbone, Sheldon Lowe and Leo I. Sagal were tried together. Segal pleaded guilty to count one at trial. Carbone's appeal was dismissed on May 11, 1966 and Lowe did not file a notice of appeal.

[6] These defendants pleaded guilty to the conspiracy count of the indictment.

1962, Edwards distributed various quantities of the stock to Milton Parness who brought Fred Sessler and Sheldon Lowe into the scheme hoping to utilize their brokerage connections. However, they thought it advisable to deal with Max Jakob, who also was familiar with the disposition of stock and who was in need of funds for his ailing enterprise. Jakob turned for aid to William Gladstone, his business associate and attorney, who obtained assistance from his law partner, Bert Markowitz.

Devising a plan which required a so-called "small man" and "big man" to dispose of the stock, Gladstone obtained approximately $60,000 of Bache purloined stock which had been passed down the line from Tallman to Jakob. Gladstone turned these securities over to Benjamin (Buddy) Clott, the "small man," who attempted to sell them, with the aid of Isidore Gorlitsky, through the brokerage facilities of Kesselman & Co. Gorlitsky was arrested, however, on July 2, 1962, after the certificates which he had presented were identified as missing from Bache.

Gladstone also utilized the services of John Lombardozzi, his "big man," to distribute the stock. Lombardozzi's attempt, with the aid of an unidentified and unapprehended co-defendant, "Robert Francine," to sell other purloined Bache securities through the brokerage houses of L. P. Denenberg & Co. and S. P. Levine & Co. failed on July 9 when it was discovered that Bache had impaired the negotiability of the stock through the use of stop orders.

Despite these events, however, arrangements were made to transact a sale of a large portion of the stolen stock on July 20 at the Robert Treat Hotel in Newark, New Jersey. The prospective purchaser was secured by Clott

and identified as a buyer from the West Coast. Actually, he was an agent of the Federal Bureau of Investigation acting undercover. The attempted sale in the New Jersey hotel led to the apprehension of the participants in the scheme and its eventual termination.

Because appellants vigorously challenge the sufficiency of the evidence underlying their convictions, we proceed to expand and present in greater detail the involved and complex and sometimes confusing facts.

The seeds of the alleged conspiracy were sown in November 1961 when defendant Gordon Tallman met defendant Robert Dodge in the "Tap Room" of the Hotel Taft. In the course of their conversation, Tallman informed Dodge that he had access to the vault of his employer—a Wall Street brokerage house[7]—and could obtain for disposal undetected, virtually any amount of negotiable securities he desired.

But, this meeting did not bear fruit immediately. It was not until April 1962 when Dodge met Tallman and co-conspirator, Francine Pomeranz,[8] that Mrs. Pomeranz suggested that Tallman steal some stock which Dodge could hypothecate for their mutual profit. After waiting for Bache auditors to complete a periodic audit, Tallman, approximately ten days later, appropriated a certificate representing 100 shares of General Motors stock registered in the name of one "Smythe" and turned it over to Dodge. But, this prologue to the alleged conspiracy ended in failure. Dodge was unable to negotiate the stock by using it as

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[7] At this meeting, Tallman did not mention Bache & Co. by name.

[8] Francine Pomeranz was separated from her husband, defendant Alan Pomeranz.

collateral for a loan because he did not have proper identification; ultimately, Dodge burned the certificate.

Undeterred by this initial lack of success, Francine suggested that her husband, defendant Alan Pomeranz, was able to distribute stolen stock. It was agreed that Dodge would act as a "middle-man" so that Tallman and Pomeranz could avoid dealing directly with one another.

In the latter part of May 1962, Pomeranz encountered appellant Robert Edwards outside the Stage Delicatessen, a restaurant in Manhattan, and asked Edward if he would be interested in participating in the disposal of some stolen securities. After learning that as much as $200,000 to $500,000 worth of certificates might be involved, Edwards counseled that it was imprudent to continue the conversation on a public street and suggested that Pomeranz contact him in a few days.

Accordingly, in late May or early June, Pomeranz called Edwards and was invited to the latter's Central Park West apartment. Edwards told Pomeranz he was interested in the proposed transaction and they proceeded to discuss its additional aspects. Indeed, Edwards stated that he had already contacted someone in connection with the deal. Edwards went on to suggest that certificates registered in a street name be obtained, and Pomeranz observed that since the stock was to be acquired from a New York brokerage house, it would be advisable to dispose of the stock away from New York. Edwards and Pomeranz also agreed to "make it a one-shot deal and take as much as [they] could get." Estimating that they could realize 15%-20% of face value, they decided to obtain $1,000,000 worth of "blue-chip" securities; to make detection of their plan difficult,

they agreed not to disclose their respective contacts to one another.

Meanwhile and during this same period, appellant Milton Parness met defendant Fred Sessler at the Debonair Restaurant in Manhattan and discussed the possibility of employing Sessler's brokerage firm, Fred F. Sessler & Co., to dispose of the stolen securities. After speaking to his partner, defendant Sheldon Lowe, however, Sessler advised Parness that his firm was inadequate for the task and suggested that arrangements with appellant Max Jakob could be made. Sessler also noted that stolen securities registered in a "street name" as distinguished from an individual's name would be readily negotiable.[9]

The day following his meeting with Edwards, Pomeranz phoned Tallman and described the "one-shot" nature of the proposed transaction. Tallman indicated that he would have no difficulty appropriating $1,000,000 of stock registered in a street name and was willing to accept 5% of the face value of the securities as his fee. When Tallman inquired as to whether "front money"—a deposit—would be forthcoming, Pomeranz noted that he assumed so but that the matter had not yet been determined.

At a subsequent meeting in Edwards' apartment, Edwards told Pomeranz that he had to be sure the stock was not counterfeit and, therefore, he and his contacts wanted to examine a sample. Accordingly, Pomeranz spoke to his

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[9] The jury could well have inferred, in the light of all the evidence, that Edwards had already contacted someone in connection with the deal, and that prior to discussing the details of the transaction with Pomeranz, Edwards had begun seeking out contacts for distributing the stolen securities and had taken this matter up with Parness.

wife, directed her to tell Dodge to obtain a sample and added that, when Dodge was ready, he would meet him at the Mermaid Room of the Park Sheraton Hotel. Mrs. Pomeranz stated that Dodge would be wearing one of Pomeranz' suits to facilitate identification since Dodge and Pomeranz did not know one another.

The following day, June 5, Tallman met Dodge at the Coachman Bar on William Street in Manhattan and gave him an envelope containing a single certificate representing 100 shares of General Motors stock registered in the street name of Bache & Co. According to plan, Dodge proceeded to the Mermaid Room of the Park Sheraton Hotel and met with Pomeranz who was seated at the bar. After a few minutes, Pomeranz walked to the men's room and Dodge followed shortly. There, Dodge handed Pomeranz the envelope containing the certificate of 100 shares of General Motors stock which Tallman had earlier appropriated and given him. When Dodge inquired about front money, Pomeranz responded that he did not know if any would be forthcoming. Dodge and Pomeranz also agreed that since they were now known to each other they would deal directly thereafter, and that Mrs. Pomeranz would no longer serve as their intermediary; accordingly, Dodge gave Pomeranz the phone number of Kennedy's Bar in the Bronx where he could be reached.

Pomeranz delivered the sample to Edwards at his apartment; Edwards stated that it would be shown to his contact the following day. Edwards also reported that no understanding had yet been reached on his and Pomeranz' share of the proceeds but he still believed they would receive between 15%-20%.

The sample was quickly passed down the line from one to another; at a meeting in Parness' car between Parness and Sessler, Parness took the 100 share certificate from the trunk of his car and showed it to Sessler. Parness explained that this was a sample and that the other securities available were similar in form. Sessler indicated his willingness, with Lowe, to participate in the distribution of the stock. Edwards later reported to Pomeranz that the sample had been shown to his contacts and that, in a few days, he would let Pomeranz know when he required delivery of the bulk of the stock. Soon thereafter, Pomeranz told Dodge his "man thought it was great and that he would need at least a million dollars worth."

Dodge relayed this information to Tallman and on June 8, at 9:00 A.M., Tallman phoned Dodge, declared that he was "all ready" and asked Dodge if he could "get it from him that day." At first, Dodge suggested that they meet again at the Coachman Bar; however, a different bar on William Street was finally agreed upon as the meeting place. At about noon, Tallman and Dodge entered the men's room of the bar where Tallman removed from the inside of his shirt a manila envelope which he handed to Dodge who, in turn, tucked it into his trousers. Tallman suggested that Dodge compile a list of the certificate numbers "because they are our only protection."

After leaving, Dodge immediately proceeded to his "hangout" at Kennedy's Bar in the Bronx. In the men's room there, he opened the manila envelope and counted approximately seventy 100 share certificates of such "blue-chip" securities as A. T. & T., I. B. M., G. M., DuPont and Standard Oil of New Jersey, all in the name of Bache. As

instructed, he compiled a list of the certificate numbers and then placed the securities in a cigar box which he secreted in the trunk of Mrs. Kennedy's automobile.

Meanwhile, Sessler was making arrangements for the disposition of the stock. Having determined that his organization, an over-the-counter firm, could not undertake to sell securities listed on the New York Stock Exchange, Sessler, at Lowe's suggestion, contacted appellant Max Jakob with whom Sessler had previous business dealings. Jakob and defendant William Gladstone were partners in Wilco Commercial Corp. (Wilco), a business engaged in interim financing and the sale and trading of put and call options. Jakob visited Sessler's office where Sessler explained that there was a large quantity of securities available which were going to be taken by a partner at Bache who needed the money to pay off his gambling losses. Sessler also noted that, because of the partner's position, the loss would not be discovered for some time. While Jakob expressed interest, he noted that until he had reviewed the proposal with his partner, Gladstone, he could not commit himself.

Jakob did not delay in discussing the proposed transaction with Gladstone.[10] He noted that the securities could be utilized to rescue Wilco from financial straits caused by the general decline of the stock market in the Spring of 1962.[11] Gladstone, who was deeply in debt to Jakob, pointed

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[10] Jakob and Gladstone had hoped to obtain $450,000 from a refinancing of property owned by Mrs. Jakob, but, for reasons not related to this case, she declined to give her approval.

[11] Gladstone's law partner, defendant Bert Markowitz, was present during some of these discussions. Gladstone and Markowitz were disbarred for professional misconduct cocerning their handling of negligence cases.

out that they ran the risk of criminal sanctions if their participation was discovered; however, when Jakob stressed Wilco's need for funds and indicated his intention to become involved, Gladstone decided to go along.

Jakob, Gladstone and Sessler thereafter met several times to discuss what each would realize from the transaction. Jakob and Gladstone indicated that they would distribute and sell the securities for 50% of face value. Sessler protested, however, stating that this would be an impossible arrangement since he was paying 55% to obtain the stock. After further negotiation, it was finally agreed that Sessler would receive 5% while Jakob and Gladstone would obtain the remaining 40%. Jakob told Sessler that since they were dealing with large amounts, percentages were not all that important and besides, " . . . I have good connections in Europe and elsewhere, and don't be so selfish, and we can make some money not only today, but in the future."

Between June 8 and June 16, Pomeranz and Edwards were in communication with each other concerning the delivery of the stock, and, on Saturday, June 16, Edwards told Pomeranz that he was ready. Pomeranz relayed this information to Dodge who borrowed Mrs. Kennedy's car and met Pomeranz at 89th Street and Columbus Avenue in Manhattan. Pomeranz explained that although the front money matter had not been settled, his contacts were ready "to start doing business." The two drove to Edwards' apartment where Dodge waited in the car while Pomeranz went inside. He returned shortly, however, noting that negotiations concerning front money were still in progress and that they should wait for a while before delivering the

stock. Accordingly, Pomeranz and Dodge went to a drugstore and after several phone calls to Edwards, Pomeranz told Dodge that no front money was available but that if they turned over the stock, they would receive $5,000 every 4 business days until their share of the proceeds had been paid. Dodge reluctantly agreed, removed the cigar box containing the stock from the trunk of Mrs. Kennedy's car and gave it to Pomeranz who wrapped it in a newspaper. Pomeranz brought this crudely concealed package to Edwards' apartment where it was opened revealing $1,005,000 worth of securities registered in the name of Bache. Because front money had not been furnished, Edwards and Pomeranz decided that only $100,000 should be turned over to Edwards' contact. Dodge phoned Tallman to report what had transpired.

Several days later, Parness gave Sessler three 100 share certificates of I. B. M., DuPont and A. T. & T. stock registered in the name of Bache. Sessler showed them to Jakob who remarked that "they look like diamonds"; ultimately, Sessler turned this stock over to Jakob.[12] At a meeting in Jakob's apartment, Gladstone outlined to Jakob and Sessler his proposal to distribute the stock through two channels: the plan called for a "small man," living in New Jersey, to deal with brokers and banks and a "big man" to efficaciously dispose of large amounts. Gladstone's "small man" was co-conspirator Benjamin Clott and his "big man"

[12] The testimony is unclear as to whether Sessler gave this stock to Jakob who, in turn, delivered it to Gladstone or whether Sessler gave it directly to Gladstone. On direct examination Sessler testified that he turned the stock over to Jakob; on cross examination, he indicated that he passed it to Gladstone.

was appellant John Lombardozzi. The plan was accepted and shortly thereafter Gladstone and Markowitz discussed the proposal with Clott who was anxious to participate. Toward the end of June, Jakob gave Gladstone the three certificates he had received from Sessler, and Gladstone surreptitiously delivered them by ostensibly abandoning the securities—hidden in a newspaper—in a phone booth to be retrieved by Clott who was close by.

Lombardozzi was brought into the scheme by Markowitz who had been his lawyer at one time. Lombardozzi was informed by Gladstone at a meeting at the law offices of Gladstone and Markowitz of the availability of "blue-chip" stock registered in Bache's name. Thereafter, he witnessed Gladstone give Sessler $10,000 cash, in an automobile in which Gladstone, Lombardozzi and Sessler were present, for the purpose of acquiring $100,000 worth of stock. For some undisclosed reason, Sessler was unable to obtain the stock from Parness and thus returned the $10,000 to Gladstone who, in turn, gave it to Lombardozzi. A day or two later, however, a parcel of the appropriated stock was acquired in the following manner: Sessler, Gladstone and Lombardozzi drove to Lexington Avenue and 57th Street where Sessler met Parness and defendant Martin Carbone in the Mayflower Restaurant. Parness told Sessler the stock would be arriving shortly. After a brief discussion, Sessler, Parness and Carbone went outside, Carbone crossed the street and talked briefly with defendant George Martinelli who handed him a newspaper. Simultaneously, Sessler gave Parness the $10,000, which had previously been given to him by Gladstone, and then crossed the street

to meet Carbone in a drugstore. Carbone turned the newspaper over to Sessler; secreted in its folds were securities registered in the name of Bache & Co. Sessler then proceeded to the automobile in which Gladstone and Lombardozzi were waiting and gave the newspaper containing the stock to Gladstone who passed it to Lombardozzi.

The $10,000 received by Parness was not distributed in one installment. After Pomeranz had spoken to Edwards several times concerning payment, Edwards reported that he had received $2,000 to show "good faith." Pomeranz, who had expected to receive $5,000 to give to Dodge and Tallman, expressed disappointment but nevertheless took the $2,000. After explaining to Dodge that he was without funds and was for that reason keeping $100 for himself, Pomeranz gave him the balance. Dodge retained $900 and delivered the remaining $1,000 to Tallman.

During the last week in June, Edwards told Pomeranz that he had received $8,000 more but had given $100 to the courier who had delivered it. Edwards and Pomeranz divided the remaining $7,900, Edwards keeping $2,500 and Pomeranz receiving $2,400 plus an additional $3,000 which he later gave to Dodge to be split with Tallman. Pomeranz indicated to Edwards his dissatisfaction with not having received more money in view of Edwards' distribution of an additional $100,000 of stock. Edwards consoled Pomeranz by stating that he expected to receive their full 15%-20% of the proceeds and that his people might well pay an amount "over and above our percentage and buy another three, four or a half million dollars worth of stock."

On June 28, the first "outside" disposal of the stock was attempted. Isidore Gorlitsky, working for Clott and pos-

ing under the pseudonym, "Edward Adler," met with one Marvin Tabak, a registered representative employed by the brokerage house of Kesselman & Co. Gorlitsky, claiming to have been sent by an anonymous mutual friend and to have $1,000,000 worth of securities to sell, produced three 100 share certificates of I. B. M., A. T. & T. and DuPont stock, registered in the name of Bache and valued at approximately $63,000, which he asked Tabak to sell. Tabak refused unless adequate proof of ownership was submitted and the unidentified friend disclosed. At Gorlitsky's request, Tabak met Gorlitsky at 6 P.M. of the same day at a diner, on the Belt Parkway, for further discussions concerning the proposed sale. Gorlitsky offered Tabak a "bonus" of $500 above his regular commission for each $100,000 of stock sold but Tabak replied, "I don't have to take any extra money. We will sell [them] . . . for you if the stocks are legitimate."

The following day, Gorlitsky gave Tabak the three certificates in exchange for appropriate receipts. Tabak explained that Gorlitsky should return four business days later on July 2 to collect the proceeds of the sale provided he would present proof of ownership. In the course of their meetings, however, Tabak had become suspicious and, as soon as Gorlitsky departed, he asked the office manager to check with Bache concerning these certificates.

Gorlitsky immediately passed the word that proof of ownership in the form of completed transfer slips was needed to consummate the sale. Clott called Gladstone, reported Gorlitsky's progress and asked what could be done to obtain the appropriate documents. Gladstone relayed this information to Jakob and then to Sessler who phoned

Parness. Parness apparently conveyed this information to Edwards because upon Pomeranz' inquiry about additional payments, Edwards replied that the proceeds from the sale could not be collected until transfer slips were presented. Pomeranz accordingly contacted Dodge who in turn called Tallman at Bache and described the plight they were in. Tallman, replying that it was "no problem," arranged to meet Dodge the following day; at that time he delivered a packet of blank Bache & Co. transfer slips. These were passed along the line from Dodge to Pomeranz to Edwards to Parness to Sessler. In the presence of Sessler, Gladstone and Markowitz, Lowe typed identification and other relevant data on the slips, and Gladstone delivered them to Clott. On July 2, Gorlitsky presented the slips to Tabak at Kesselman & Co. By this time, however, the police, as a result of investigating at Bache, arrested Gorlitsky.

Gortlitzky's arrest produced a wave of deep apprehension all along the alleged conspiracy chain. Clott called Gladstone and stated that there was "beaucoup trouble" because "his man" had been arrested while attempting to negotiate the securities. Gladstone reported this information to Sessler, who had come to Gladstone's office on other business, but Gladstone assured him that bail and counsel would be furnished. That evening, Gladstone informed Jakob of Gorlitsky's arrest and that Bache had apparently discovered that some securities were stolen.

Tallman quickly became aware that something had gone awry. On July 2, he called Dodge from Bache to report that the police were "all over the place" and that he "heard on the grapevine that somebody had been arrested

regarding this stock." Tallman counseled caution should Dodge seek to communicate with Pomeranz. Later that day, however, Pomeranz called Dodge and when Dodge related what had transpired, Pomeranz stated that he had already been informed of the arrest and that there was little reason for excessive concern since the person who had been apprehended was a mere "flunky, . . . a bookie from Florida," who "didn't know a thing."

Parness also pressed Sessler for information as to what had gone wrong. Sessler played down the arrest, assuring Parness that while it was unfortunate, it was not a serious setback.

Edwards' anxiety over the arrest was not easily assuaged. In his presence, Pomeranz called Dodge and asked whether Tallman could be setting "traps" since people were being arrested "all over the place." When Dodge assured Pomeranz that Tallman was not cooperating with the autories, Pomeranz replied, "Well, you tell that to my boy Bobby," and put Edwards on the phone for further reassurance.

Despite Gorlitsky's arrest, money continued to be distributed among the participants in the scheme. On July 5, Edwards told Pomeranz that he had met his contact and received an additional $8,000. Edwards retained $2,500 and gave the balance to Pomeranz who kept $2,500 for himself and later delivered the remaining $3,000 to Dodge. Pomeranz pointed out that although approximately $200,000 worth of stock had been distributed, they had received only $18,000 which was $12,000 less than their 15% share; Edwards replied that the balance would be forthcoming shortly.

During the period that Gorlitsky had been attempting to dispose of the stock allocated to Clott, Lombardozzi, the so-called "big man," working through Robert Francine, attempted to dispose of securities amounting to $100,000 which he had received from Sessler. On June 28, Lombardozzi asked Herman Weinstein, a securities trader at L. P. Denenberg & Co., if he could sell "blue-chip" stock registered in a street name. Weinstein, not yet qualified as a registered representative, suggested that his employer, Lee Denenberg, could do so. Lombardozzi advised Weinstein that a friend of his would contact him the following day.

As scheduled, the next day Robert Francine, having introduced himself as a friend of "John Lombardo," came to Weinstein's office and upon inquiry by Francine was told by Weinstein that proceeds from the sale of stock could not be collected until four business days after sale. Francine then produced three 100 share certificates of Polaroid, DuPont and General Motors stock registered in the street name of Bache which was turned over to Weinstein and for which he was given a receipt. After checking the serial number of the DuPont certificate with the clearing house and ascertaining that no stops had been issued against it, Denenberg sold the three certificates. On July 3, Denenberg traded an additional 100 share certificate of DuPont in Francine's behalf. At Weinstein's suggestion, Francine also utilized the offices of S. P. Levine & Co., a brokerage firm, to dispose of more stock. Agreeing to a "cash trade" resulting in payment within 25 hours at a penalty of from ⅛ to ¼ a point per share, Francine sold through the Levine offices 200 shares of G. M., A. T. & T. and Standard Oil of

New Jersey registered in the name of Bache for approximately $41,000.

On July 5, Weinstein gave Francine two checks, drawn on the account of L. P. Denenberg & Co., to cover the proceeds of the stock Denenberg sold in Francine's behalf. Francine was told, however, that the checks could not be cashed for 3 additional business days.[13] The following day, Lombardozzi gave Sessler the two Denenberg checks and suggested that they be used to purchase additional stock. After discussing this proposal with Parness, who insisted upon receiving cash, Sessler returned the checks to Lombardozzi. Even upon speaking directly to Lombardozzi,[14] Parness remained adamant in demanding cash. That evening, when Pomeranz visited Edwards' apartment, he was shown the two Denenberg checks. Upon Pomeranz' inquiry concerning their remaining $12,000 share, Edwards explained that the checks would be cashed in a few days and they would then be paid.

On July 9, Francine received a check from S. P. Levine & Co. for approximately $30,000 in partial payment for the stock the Levine firm sold at his request. But, when Francine learned from Levine's bank that there were insufficient funds to reduce the check to cash, he angrily returned to Levine's office where, in an attempt to placate him, he was offered two checks—one for $9,000 and the other for $21,000—with the suggestion that the smaller could be cashed immediately. Francine flung the checks on the table and demanded cash or a certified check. When

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[13] This extra time was required so that the checks given to Denenberg in payment for the stock could clear.

[14] This was the first time that Sessler introduced Lombardozzi to his contact.

neither was forthcoming he left in anger. A short while later, Weinstein told Levine that he received a call from Denenberg, who had discovered a problem with the stock, and recommended that Levine "hold up on the trade."

Later that day, Edwards informed Pomeranz that a stop had been placed on the certificates and that if the remaining $850,000 of stock was not turned over to his associates without payment, he would be "in the jackpot." Edwards pointed out that his contacts believed they had been betrayed and would hold him responsible if the additional stock was not immediately forthcoming. Concerned over Edwards' welfare, Pomeranz consented telling Edwards that under these circumstances "money [becomes] meaningless." Edwards observed that if the stock was surrendered, he and Pomeranz might still receive 10% of its face value.

Accordingly, Edwards turned over the remaining securities and, in the middle of July, Clott informed Gladstone that he found a customer—"a big buyer on the West Coast"—who was interested in purchasing the Bache certificates which had not yet been reported as missing or stolen. After conferring with Jakob, Gladstone obtained from Sessler a list of the numbers of those certificates which were available for sale. This list, designed to aid the "West Coast" buyer in determining which securities he wished to purchase, was delivered by Gladstone to Clott. Gladstone then reported to Jakob that he had obtained the list of securities and delivered it to Clott. Jakob expressed pessimism over making any money on the transaction but noted that in view of Wilco's critical financial situation, anything "would be helpful at this point."

Initially, it was arranged that Clott's buyer would be met at Idlewild Airport in New York (now Kennedy International Airport), but the plans were changed and the transfer of the stock was fixed for July 20 at the Robert Treat Hotel in Newark, New Jersey. But, here the plot thickens for unknown to the other participants in the scheme, Clott had begun cooperating with the F. B. I. and his "customer" was actually Special Agent Ralph Desena using the pseudonym "Ralph Cava." On July 20, Desena occupied Room 911 in the Robert Treat Hotel; in mid-afternoon, Clott accompanied by Parness, Lombardozzi and Martinelli entered the room and, after introductions, negotiations commenced. Desena stated that he was given to understand that he was to pay 40% of face value for those certificates which had not been reported as missing and 10% for the others. Parness stated that the deal was only for "clean" certificates for which Desena was to pay 35%. Parness noted that the "other stuff" could not be sold for 10% since more than that was paid for it. Deferring discussion on the securities reported as missing, Parness told Desena that he was prepared to sell two I. B. M., four A. T. & T., five General Motors and seven Standard Oil certificates, each representing 100 shares. Desena checked Parness' calculations and agreed that 35% of the face value of these securities came to $61,836 based on the prices listed in that morning's New York Times. When Desena indicated willingness to make payment, Parness left the room to gather the stock. Lombardozzi then asked Desena about his interest in the certificates which were listed as missing and noted that they could be obtained in an hour and a half. When Desena equivocated, Lombardozzi explained that "the other stuff is good, it's

just hot" and added that "unfortunately something happened to us" which led to the discovery by Bache of the missing securities.

At this point, Desena answered a knock on the door. It was Carbone who asked for Martinelli and handed him a newspaper in which an envelope had been secreted. Opening the envelope, Martinelli removed 18 certificates and handed them to Desena who, after inspecting them to assure himself that they were the stolen Bache securities, left the room explaining that he would return shortly with the money.

A few moments after Desena left, other F. B. I. agents entered Room 911, arrested Lombardozzi and Martinelli and found the 18 certificates under a pillow as well as a list published by theNational Association of Securities Dealers (NASD) containing the numbers of the certificates reported as stolen from Bache. It is interesting that none of the certificates found in the room were described on the NASD list. Edwards, Jakob and Parness were apprehended subsequently.

I.

We shall first consider those contentions raised by appellants which affect all or several of them. We shall then discuss additional arguments specifically raised on behalf of particular defendants.

Sufficiency of the Evidence

The above detailed statement of the facts has been necessitated by the vigorous attack made upon the evidence and the sufficiency thereof.

Appellants raise the not unfamiliar contention that the evidence demonstrated the existence, not of a single conspiracy, but of at least two. It is argued that the first conspiracy was composed of Tallman, Dodge, Pomeranz and Edwards who were concerned with appropriating the stock and its initial distribution; the second conspiracy, it is contended, was comprised of Parness, Sessler, Jakob, Gladstone, Lombardozzi and others who participated in subsequent distribution efforts. Appellants press upon us that there was no proof of any link between the two groups.

The evidence, however, amply refutes this contention and discloses the classic single "chain" conspiracy. The circulation of the certificate for 100 shares of General Motors stock as a "sample," the identity between the numbers of the certificates reported taken from Bache and those offered for sale at the New York brokerage houses and in New Jersey; the passing along the line of the Bache and Co. transfer slips and the Denenberg checks, the interconnection and linkage in one form or another of all the participants in the disposal of the securities stolen by Tallman from Bache, provided sufficient evidence of a single conspiracy to justify submission to the jury of the question as to whether there was one overall scheme. The trial judge's instruction in this connection properly focused the jury's consideration of this question and the jury's verdict determining that one overall conspiracy to transport securities in interstate commerce cannot be faulted.

The evidence also refutes Edwards' contention that there was no proof that he ever dealt with Parness. The jury could have inferred these dealings from incidents such as that testified to; for example, that Pomeranz delivered the

Bache & Co. transfer slips to Edwards which ultimately ended up in the possession of Parness who subsequently turned them over to Sessler. And, it is black letter law that all participants in a conspiracy need not know each other; all that is necessary is that each know that "it has a 'scope' and that for its success it requires an organization wider than may be disclosed by his personal participation." *United States* v. *Agueci*, 310 F. 2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U. S. 959 (1963); *United States* v. *Stromberg*, 268 F. 2d 256 (2d Cir.), *cert. denied*, 361 U. S. 863 (1959). The "chain" type of conspiracy has as its purpose the disposal of the trained commodity into the hands of the ultimate purchaser. See *United States* v. *Agueci, supra.*

Jakob asserts that there was insufficient proof that the securities were actually stolen or that he possessed knowledge of this. The surreptitious and furtive transfers of the stock from Tallman to Dodge and from Dodge to Pomeranz in bars and lavatories for a fraction of its face value and the other unorthodox methods utilized in its disposition are ample evidence from which the jury could draw an inference of theft. Moreover, Gladstone's conversations and activities with Jakob and his testimony that he warned Jakob of possible criminal sanctions if their participation in the disposal plan was discovered leaves little room for argument that the jury could not have drawn the inference that Jakob was fully aware that he was dealing in stolen stock.

Lombardozzi also raises the question that the evidence was not sufficient to show that he was a knowing participant in the conspiracy. We need not linger long over this

contention for our recital of the evidence clearly demonstrates that there was ample support for the verdict that he was a knowing participant in the scheme.

ENTRAPMENT

Jakob and Lombardozzi maintain that their convictions should be reversed because the commission of the offenses was the result of entrapment by the government working through Clott and Special Agent Desena. The crux of their argument, as we understand it, is that the government added the interstate element to the offenses charged by arbitrarily switching the transaction with Desena from Idlewild Airport in New York to the Robert Treat Hotel in New Jersey.

We find this argument unpersuasive. Entrapment results from overzealous activity by government agents designed to incite an innocent man to crime. But, "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." *Sorrells* v. *United States*, 287 U. S. 435, 441 (1932). In the present case, the government did no more than afford the opportunity and facilities for the commission of the offense charged; the participants were awaiting "any propitious opportunity," see *United States* v. *White*, 223 F. 2d 674, 676 (2d Cir.), *cert. denied*, 350 U. S. 888 (1955); *United States* v. *Riley*, —— F. 2d —— (2d Cir. 1966), and never considered themselves limited by New York State's boundaries. Indeed, when the scheme was in its early stages, Pomeranz suggested to Edwards that the stock should be disposed of outside New York, and Jakob and Lombardozzi mentioned Europe as a possible place for sale. Moreover, it is significant that no evidence

on the question of entrapment was introduced at trial; the issue was not adverted to in any of the defense summations and no instructions to the jury on the subject were requested. Indeed, the only and solitary mention of entrapment occurred immediately prior to the court's charge when Lombardozzi moved for acquittal on this ground. In view of the absence of any evidence of entrapment, Judge Wyatt correctly denied this motion.

Recordings of the Conversations at the Robert Treat Hotel

It is urged that the government invaded the constitutional rights of Lombardozzi and Parness under the First, Fourth and Fifth Amendments, by recording their discussions at the Robert Treat Hotel, concerning the sale of the Bache securities. While this general area of law is once again *sub judice* in the Supreme Court, see *United States* v. *Osborn*, 350 F. 2d 497 (6th Cir. 1965), *cert. granted*, —— U. S. ——, (1966), we believe that on the facts and circumstances presented here, appellants' argument lacks merit. The F. B. I. rented Rooms 911 and 912 at the Robert Treat;[15] appellants were invitees who had no property interest in the premises and, more significantly, were there voluntarily to further their own purposes. While the Supreme Court has not been undivided on this question, it has consistently held that the prohibition against unreasonable searches and seizures does not prevent the making and use of recordings of conversations between government agents and persons suspected of criminal activity.

[15] The microphone was placed in Room 911 and the recording equipment was placed in Room 912.

Lopez v. *United States*, 373 U. S. 427 (1963); *On Lee* v. *United States*, 343 U. S. 747 (1952); *Goldman* v. *United States*, 316 U. S. 129 (1942). And, in dealing with a case quite similar to that presented here, we observed that "the planting of microphones in a hotel room with [the] consent [of its occupant does not amount] to trespass within the definition of the majority in *On Lee*, or approach the physical invasion of another dwelling without consent perpetrated with the spike mike whose fruits were excluded in *Silverman* v. *United States*, 365 U. S. 505 (1961)." *United States* v. *Kabot*, 295 F. 2d 848, 854 (2d Cir. 1961), *cert. denied*, 369 U. S. 803 (1962). Moreover, we note that Agent Desena's testimony describing the conversations in which he participated with Lombardozzi and Parness was admitted without objection.

THE CHARGE

Appellants challenge the judge's charge in several respects.

Jakob urges that the court became an advocate and incorrectly marshalled the evidence and weighted it in favor of the prosecution. We have carefully reviewed the court's instructions and find this contention without merit. Since most of the trial was occupied with the presentation of the government's case, it was to be expected that the judge would devote more time to the government's case in summarizing the evidence. See *United States* v. *Dardi*, 330 F. 2d 316, 330 (2d Cir.), *cert. denied*, 379 U. S. 845 (1964); *United States* v. *Kahaner*, *supra* at 476. Moreover, Judge Wyatt gave the usual admonition to the jury that its recollection of the facts and not his was controlling, that it

must consider all of the evidence and not merely that mentioned by the court, and that the jury was the sole judge of the facts. In addition, just before submitting the case to the jury, Judge Wyatt instructed them:

> . . . I could not possibly, in attempting to summarize the contentions of the parties mention everything. . . . [Y]ou are to draw no conclusions from my failure to include something in this summation.

We find no error in the judge's marshalling of the evidence. See *United States* v. *Bentvena*, 319 F. 2d 916, 940 n. 14 (2d Cir.), *cert. denied*, 375 U. S. 940 (1963). Indeed, the judge displayed an awareness and sensitivity to the management problems inherent in multi-defendant conspiracy cases. See *United States* v. *Agueci, supra* at 840.

Jakob also argues that the charge was deficient in failing to state that each participant in the conspiracy must have had knowledge that the conspiracy involved an element of interstate or foreign transportation. We find the instructions on this point to be unmistakably clear and correct. Judge Wyatt instructed the jury that it could convict only if it found beyond a reasonable doubt that the conspiracy embraced the concept that the stolen securities "shall cross state lines or move to foreign countries." The judge added that the jury was duty bound to acquit unless it found that the conspiracy comprehended "either expressly or by implication, the transportation of the stolen certificates in interstate or foreign commerce." And, stressing the requirement of knowledge, the court added:

> So it must be shown beyond a reasonable doubt that the understanding of the conspirators, either expressly

or by implication, was that the stolen certificates would move in interstate or foreign commerce.

Finally, the court noted that each defendant "must be found to have knowingly associated himself with the conspiracy."

We also find no error in that portion of the charge which instructed on the relationship between the conspiracy and substantive counts. The court charged that a defendant could be convicted on the substantive count of transporting stolen securities in interstate commerce (Count Two) if the jury found that the substantive offense was committed in furtherance of the conspiracy and that, at the time of the commission of the substantive offense, the particular defendant was a member of the conspiracy. This instruction was based upon and correctly reflects the teaching of *Pinkerton* v. *United States*, 328 U. S. 640 (1946). Jakob now urges, for the first time, that the court should have added that "the substantive offense must have been committed in furtherance of the conspiracy and not merely as an unforeseen part of the ramifications of the plan," citing *United States* v. *Barrow*, 229 F. Supp. 722, 733 (E. D. Pa. 1964). While this addition would not have detracted from or confused the charge, Jakob did not request such an instruction and the district judge cannot be faulted for not utilizing additional words suggested by those having the benefit of afterthought.

Moreover, we see no merit in the criticism of the court's instruction on reasonable doubt; as given, it was similar to that approved in *Holland* v. *United States*, 348 U. S. 121, 140 (1954) and *United States* v. *Heap*, 345 F. 2d 170, 171 (2d Cir. 1965). Nor was it prejudicial error for the court to set forth the reasons why Congress regarded conspiracy

as a crime meriting separate treatment from substantive offenses. While we see little purpose in advising the jury of the congressional intent in enacting the statute, the court did little more than paraphrase the language of *United States* v. *Rabinowich*, 238 U. S. 78 (1915), quoted with approval in *Pinkerton* v. *United States*, *supra* at 644, concerning the dangers of conspiracy.

Additional Points Affecting More Than One Appellant

Further issues are raised which concern several or all of the appellants; they can conveniently be considered at this juncture.

It is urged that the fairness of the trial was vitiated when the government called Gordon Tallman to the stand knowing that he would refuse to testify and would claim the privilege against self-incrimination.[16] It is clear that the government suspected that Tallman might invoke the Fifth Amendment privilege; indeed, it had arranged for a Legal Aid attorney to be present to advise him and had submitted a memorandum to the court contending that the privilege was unavailable to Tallman on the ground that he was immune from further prosecution as the result of his plea of guilty to a federal conspiracy indictment and his conviction on a related state charge. We are convinced that the government called Tallman in good faith reasonably expecting the district judge to order him to testify.[17]

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[16] This claim is made for the first time on appeal.

[17] The government attorney did not realize that Tallman was not immune from prosecution for income tax evasion or from aiding and abetting the commission of the substantive offense.

Thus, we are not dealing with a case where the prosecution made "a conscious and flagrant attempt to build its case out of inferences arising from use of testimonial privilege," see *Namet* v. *United States*, 373 U. S. 179, 186 (1963). Moreover, in contrast to *United States* v. *Maloney*, 262 F. 2d 535 (2d Cir. 1959), the government made no reference to Tallman's failure to testify; indeed, it requested that the jury be excused as soon as Tallman was sworn. And, the judge's instruction—not present in *Maloney*—removed any possible inference against the defense which the jury might have drawn from Tallman's refusal to testify.[18] See *United States* v. *Romero*, 249 F. 2d 371, 375 (2d Cir. 1957).

Nor are we persuaded that the appellants were prejudiced by the guilty plea of co-defendant Leo I. Sagal on the first day of trial. Sagal entered his plea in the absence of the jury; the court then instructed that Sagal had pleaded guilty to the first count of the indictment which "is not evidence of the guilt of the defendants on trial here and gives rise to no inference against any defendant here." While it would have been preferable for the court merely to note that Sagal had been excused and that the trial would proceed without him, any possible error was cured by its cautionary instructions. See, e.g., *United States* v. *Dardi, supra*; *United States* v. *Aronson*, 319 F. 2d 48 (2d Cir.), *cert. denied*, 375 U. S. 920 (1963); *United States* v. *Crosby*, 294 F. 2d 928 (2d Cir. 1961), *cert. denied*, 368 U. S. 984 (1962).

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[18] The judge told the jury:

> The second witness [i.e., Tallman] . . . has been excused by order of the Court. You are not to draw any inference from that fact of any sort, either for or against the government or for or against any defendant now on trial.

It is argued, also, that the court committed prejudicial error in refusing to order the government to produce Clott at trial. But, the government is not obliged to produce witnesses who are not within its control, see *United States* v. *D'Angiolillo*, 340 F. 2d 453 (2d Cir.), *cert. denied*, 380 U. S. 955 (1955); its responsibilities are satisfied when it discloses a potential witness' name and last known address, see *D'Ercole* v. *United States*, —— F. 2d —— (2d Cir. 1966), which the government did in this case. And, after obtaining this information the defense did not seek an adjournment for the purpose of locating Clott nor is there any indication in the record that he was subpoenaed. Moreover, there was no prejudicial error in the court's charge that since Clott was equally available to the prosecution and the defense, failure to call him "may not be used . . . as the basis for an inference for or against the government or for or against any defendant." Cf., *United States* v. *Armone*, —— F. 2d —— (2d Cir. 1966).

We see no more than "harmless error" in the government's inadvertent failure to turn over F. B. I. Agent McDonald's grand jury testimony at trial. When this oversight was discovered approximately three weeks after trial, the government sent these minutes to Judge Wyatt who forwarded them to defense counsel. When several counsel moved for a new trial on the basis of the belated production of this transcript, Judge Wyatt denied the motions, observing that even if certain inconsistencies between McDonald's testimony before the grand jury and at trial discredited the Agent, "it wouldn't have the slightest effect on the verdict." We have examined McDonald's grand jury testimony and are unpersuaded that this ruling was not correct.

McDonald's brief testimony at trial was of minimal importance and did no more than corroborate the evidence of Gladstone's meeting with Clott the day before the events at the Robert Treat Hotel. Although one court has suggested that the failure to produce prior statements of government witnesses is ground for reversal even in the absence of any demonstration of prejudice, *Bergman* v. *United States*, 253 F. 2d 933, 935 (6th Cir. 1958), we have declined to reverse where non-production could properly be classified as "harmless error," see *United States* v. *Kahaner, supra* at 473.

II.

Having considered those grounds urged for reversal which would affect several or all of the appellants, we proceed to the contentions raised by particular defendants in their own behalf.

Asserted Comment on Jakob's Failure to Testify

Addressing the jury at the close of the trial, the government attorney stated that in reviewing the evidence for the jury Jakob's attorney had overlooked testimony which incriminated his client:

> He forgot to mention, for instance, that William Gladstone testified uncontradicted that he, Gladstone, told Jakob on or about July 2 . . .

Jakob's counsel interrupted, requested a conference out of the hearing of the jury and moved for a mistrial on the ground that the prosecutor had improperly commented upon Jakob's failure to testify by characterizing Glad-

stone's testimony as "uncontradicted." The judge denied the motion and immediately admonished the jury to disregard this statement and specifically directed them not to draw any unfavorable inference from the failure of Jakob to testify in his own behalf. The following day, the court in its charge repeated these instructions.

We are not persuaded that the prosecutor's comment followed by the court's immediate curative instructions resulted in reversible error. See *United States* v. *Agueci, supra* at 831; *United States* v. *Stromberg,* 268 F. 2d 256, 271 (2d Cir.), *cert. denied,* 361 U. S. 863 (1959). While the court's instructions may have to some extent called attention to Jakob's failure to take the stand, see *Stewart* v. *United States,* 366 U. S. 1, 10 (1961), counsel for Jakob did not object when the court indicated its intention to deliver them.

VARIANCE BETWEEN THE INDICTMENT AND THE PROOF

Jakob also contends that he was prejudiced by the three week difference between the date of overt act 8 as described in the indictment and the proof at trial. The indictment charged that in furtherance of the conspiracy, Jakob met with Gladstone, Markowitz and Sessler on or about July 14, 1962. At trial, the government's evidence showed that the meeting took place on or about June 20. We do not regard this minor variance as fatal. See *United States* v. *Armone, supra* at ——; *United States* v. *Glaze,* 313 F. 2d 757 (2d Cir. 1963). Although Judge Wyatt informed counsel for Jakob that he could have any additional time which might be necessary to prove a defense because of the difference in dates, no request for a continuance was made.

PARNESS' DOUBLE JEOPARDY AND RIGHT TO COUNSEL CLAIMS

Parness asserts that his conviction in the present case was based on the same conspiracy for which he was convicted in *United States* v. *Parness,* 331 F. 2d 703 (3rd Cir.), *cert. denied,* 377 U. S. 993 (1964) and that, therefore, he was placed in "jeopardy" twice for the same crime in violation of the Fifth Amendment.

It is true that both convictions were for conspiracy to transport stolen securities in interstate commerce, in violation of 18 U. S. C. §2314. However, there the resemblance between the two offenses ends. The New Jersey indictment charged a conspiracy lasting from June 1961 to January 1962, between Grimmett, Favata, McLaren and Parness to transport securities stolen from Hans and Plate. The present indictment charged a conspiracy between Dodge, Tallman, Pomeranz, Edwards, Sessler, Lowe, Gladstone, Markowitz, Lombardozzi, Carbone, Martinelli, Parness and others lasting from April 1962 to July 1962, to transport stock stolen from Bache & Co. While it is clear that "a single conspiracy cannot be split up for the purpose of prosecution," *United States* v. *Cohen,* 197 F. 2d 26, 29 (3d Cir. 1952), this case plainly involves a conspiracy separate from that for which Parness was convicted in New Jersey. And, while it is true that there was mention in the New Jersey trial that Parness was making arrangements to deliver to Grimmett in the future $1,000,000 of securities, and that two persons identified as John and George were present at a meeting in January 1962 when Parness received money for a future delivery of $1,000,000 worth of stolen stock, "George" being identified as George Martinelli, the

source of the stock to be stolen in the future was not identified.

As we observed in *United States* v. *Kramer*, 289 F. 2d 909, 913 (2d Cir. 1961):

> Offenses are not the same for the purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct; they are the "same" only when "the evidence required to support a conviction upon one of them [the indictment] would have been sufficient to warrant a conviction upon the other."

Applying this test, the evidence required to support a conviction upon the New Jersey indictment would not have warranted a conviction upon the present indictment; and the converse is equally true. The present case closely resembles *United States* v. *Aviles*, 274 F. 2d 179, 193-94 (2d Cir.), *cert. denied*, 362 U. S. 974, 982 (1960), in which we rejected a similar claim of double jeopardy, where the appellants in a narcotics conspiracy case had previously been convicted of a narcotics conspiracy involving different principals, techniques, sources of supply and routes of distribution. Judge Wyatt carefully analyzed and compared the evidence in the two prosecutions and we are in agreement with his finding that two separate and distinct conspiracies were involved.

Nor are we persuaded by Parness' argument, resting primarily upon *Massiah* v. *United States*, 377 U. S. 201 (1964), that his Sixth Amendment rights were violated by Agent Desena's discussion and negotiation with him in the Robert Treat Hotel without advising Parness of his

right to counsel. Putting aside for the moment the fact that no objection on this ground was made to the admission of evidence of this conversation, see *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965), *cert. denied*, 383 U. S. 907 (1966), we note that *Massiah* is inapposite. While Parness was under indictment for an unrelated conspiracy offense at the time of the meeting at the Robert Treat Hotel, we do not read *Massiah* as forever immunizing a defendant under indictment for a distinct and unrelated crime from the normal techniques employed by law enforcement officials to investigate other and wholly separate offenses. The F. B. I.'s plan to use Agent Desena as an informant would have been completely thwarted if Desena had been required to disregard his pseudonym and role as a participant in the scheme and give the caveat Parness suggests. Neither *Massiah* nor any of the other cases cited to us in this connection compel this illogical conclusion.

LOMBARDOZZI'S PREJUDICIAL PUBLICITY POINT

While the trial was in progress, a New York newspaper published an article which reported *Carmine* Lombardozzi's arrest as a scofflaw and referred to him as the "Mafia King of Wall Street." Appellant *John* Lombardozzi moved for a mistrial contending that the adverse publicity concerning Carmine was likely to affect the jurors' view of John, who was his brother. Judge Wyatt properly denied this motion. The newspaper article made no mention that Carmine had a brother named John; and the only oblique reference at trial to a brother of John occurred when it was pointed out that John performed services for a com-

pany in which his brother (whose first name was not mentioned) was a principal. Thus, there was very little, if any, connection at trial between John and Carmine and the judge acted well within his discretion in declining to poll the jurors to determine if their judgment had been affected by this news item; indeed, in the circumstances presented here, such polling might have served only to underline John's filial relationship with Carmine. See, e.g., *United States* v. *Bowe*, —— F. 2d —— (2d Cir. 1966); *United States* v. *Bentvena*, *supra* at 934; *United States* v. *Feldman*, 299 F. 2d 914, 917 (2d Cir.), *cert. denied*, 370 U. S. 910 (1962).

EDWARDS' NEWLY DISCOVERED EVIDENCE CONTENTION

We find no merit in Edwards' contention that the trial court erroneously denied his motions to reopen his case and for a new trial on the ground of purported newly discovered evidence which allegedly showed that Edwards could not have been present at places where Pomeranz testified they had met.

It was not until three weeks after Pomeranz completed testifying that Edwards made his claim; but, during that entire period Edwards knew the precise dates and places where Pomeranz described the meetings and conversations which they had. Moreover, although Edwards testified in his own defense, he never stated that it was geographically impossible for him to have been present where Pomeranz placed him—a claim made on his motion for a new trial. Finally, there was no satisfactory showing before the trial judge as to reasons why the supposed "documentary proof"

which was allegedly in the hands of an accountant employed by Bache & Co.[19] in New York could not have been brought to the court's attention during trial by the exercise of due diligence. In these circumstances, we cannot say that Judge Wyatt abused his discretion in denying the motion to reopen Edwards' case. See *United States* v. *Houlihan*, 332 F. 2d 8 (2d Cir.), *cert. denied*, 279 U.S. 828 (1964).

Similarly, the district judge cannot be faulted for refusing a new trial to Edwards on the ground of newly discovered evidence. When Edwards requested additional time to submit "the documentary evidence" in support of this motion, Judge Wyatt granted him in excess of two weeks to present this material. But, nothing further was submitted, and, accordingly, the motion was denied as being "without merit." It is fundamental "that a defendant seeking a new trial under any theory must satisfy the district court that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or, at the latest, during the trial." *United States* v. *Costello*, 255 F. 2d 876, 879 (2d Cir.), *cert. denied*, 357 U. S. 937 (1958). See also *United States* v. *Passero*, 290 F. 2d 238, 244-45 (2d Cir.), *cert. denied*, 368 U.S. 819 (1961).

III.

We have carefully considered appellant's remaining contentions and find them without merit; accordingly, all of the convictions are affirmed.

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[19] It is only coincidental that this alleged accountant was employed by Bache & Co.

APPENDIX C

Portions of Record Raising Constitutional Questions Below

Letter to Judge Wyatt

Honorable Inzer B. Wyatt
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

December 3, 1965

Re: United States v. Robert Dodge, et al.
64 Cir 619

Dear Judge Wyatt:

Subsequent to the completion of the trial in the above-captioned case and during the course of the Government's preparation for the then expected trial against the defendants Lekacos and Lavas, the Government discovered in its files certain Grand Jury tesimony of F. B. I. Agent Joseph McDonald. This testimony will be delivered to your chambers next week by a representative of the U. S. Attorney's office.

As you are aware, Agent McDonald testified for the Government at the trial concerning his surveillance of the activities of Benjamin Clott and William Gladstone on July 19, 1962 (R. 1511-39, 1558-61). The Grand Jury testimony of Agent McDonald for the most part (see pages 1-7) in no way relates to this surveillance nor does it even relate to the activities of any of the defendants who stood trial. Accordingly, this portion of the minutes is, of course, not in

consistent with Agent McDonald's trial testimony. The only pages of this testimony which can be said to relate to McDonald's trial testimony are certain portions of pages 8 through 11. However, to the extent that they do relate, they are in no way inconsistent with Agent McDonald's testimony. See *United States* v. *Zborowski*, 271 F. 2d 659 (2d Cir. 1959). Accordingly, it is the Government's application that Your Honor, after making appropriate findings, seal the Grand Jury testimony as an exhibit for appeal. *Cf. United States* v. *Kahaner*, 317 F. 2d 459 (2d Cir.), *cert. denied*, 375 U. S. 836 (1963).

Respectfully yours,

ROBERT M. MORGENTHAU
United States Attorney

By: .....
CHARLES A. STILLMAN
Assistant U. S. Attorney

Appendix C—Portions of Record Raising Constitutional Questions Below

Grand Jury Testimony of Agent McDonald

Q. Agent McDonald, I remind you you're still under oath. Now, let me direct your attention to the 19th of July, 1962, and ask you first whether or not you know a man named Benjamin Clott. A. Yes, I do.

Q. And let me ask you whether or not you conducted a surveillance of his activities on that day. A. Yes, I did.

Q. Were there any other agents who were conducting a similar surveillance at that time? A. Yes, one other agent, Special Agent Emmett A. Schmitt.

Q. At approximately what time did the surveillance begin? And let me say that if your recollection flags, please make reference to your notes. A. It began shortly before one o'clock and we were observing the corner of 60th Street and Park Avenue. At that point it was approximately 12:56 P.M. I observed Benjamin Clott standing on the southeast corner of that intersection, 60th Street and Park Avenue. He stood there for approximately twenty minutes. At about 1:17 P.M. he was joined by another individual, a man approximately forty years of age, five-eight, a hundred-sixty, a hundred-seventy pounds, dark hair, and he wore horn-rimmed glasses. They spoke for a few minutes there at the intersection and then walked south on Park Avenue to the corner of 59th Street and Park. There's a building at the northeast corner there—it's 505 Park Avenue. The stranger, the man I've just described, entered this building and Clott waited for him outside. He waited approximately fifteen or twenty minutes; then the other man came out, joined him. They went around the corner on 59th Street, walking east, and

Appendix C—Portions of Record Raising Constitutional Questions Below

Grand Jury Testimony of Agent McDonald

entered a parking lot, and I subsequently observed them enter a—about a 1953 Cadillac sedan, and at this point discontinued the surveillance.

Q. I show you what has been marked Grand Jury Exhibit No. 1 of the date of February 4th, 1963, and ask you to tell me whether or not you recognize the person photographed there. A. Yes, this is the man I described to you, the man who met Clott at the corner of 60th Street and Park Avenue, subsequently walked with him down the street and entered 505 Park.

Q. Now, would you reverse Grand Jury Exhibit No. 1 of February 4th, '63, and tell us whose name appears on the rear of that photograph. A. William B. Gladstone.

Q. Did there come a time thereafter during the course of that day that you had a meeting with Mr. Clott? A. Yes.

Q. Now, what, if anything, did he relate to you at that time as having transpired during the period of your surveillance? A. He related that he met William Gladstone at the corner, as related, and that he subsequently waited for him while Gladstone went into 505 Park, and then they entered Clott's automobile, drove about a block, where they experienced some mechanical failure with the car; at that point Gladstone left him.

Q. Did Clott give you to understand what the purpose of Gladstone's visit to 505 Park Avenue was? A. Yes, he did, said that Gladstone had visited that location to obtain a list of stock certificates which he subsequently turned over to Clott.

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Grand Jury Testimony of Agent McDonald

Q. And did Clott turn that list of stock certificates over to the FBI? A. Yes, he did.

Q. Now, did Clott indicate to you whether he had been given to understand by Gladstone that the list was prepared in Gladstone's own handwriting or in the handwriting of someone other than Gladstone? A. He didn't tell me that.

Q. Now, this list of securities that was obtained by Gladstone and furnished to Clott, I take it these were the securities that were to be produced on the next succeeding day at the Robert Treat Hotel in Newark, New Jersey? A. That's right.

Q. Do you know, of your own knowledge, whether or not those securities were, in fact, produced on that day? A. From my own knowledge, no.

Q. Then by hearsay information of other agents of the FBI? A. Yes, I do.

Q. Do you know whether or not an examination of those certificates was undertaken to determine, one, whether they paralleled exactly the list furnished by Gladstone? A. Of my own knowledge, I don't know.

Q. Of hearsay knowledge of other agents? A. Yes.

Q. And they did parallel exactly? A. That's correct.

Q. Do you also know, either of your own knowledge or of hearsay information, whether or not the certificate numbers were compared against the inventory prepared by Bache to determine whether or not these were the stocks that were stolen in the early part of June, 1962? A. Yes.

Appendix C—Portions of Record Raising Constitutional Questions Below

Memorandum Order of Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

64 Cr. 619

UNITED STATES OF AMERICA,

v.

ROBERT J. DODGE, and others,

Defendants.

MEMORANDUM

WYATT, District Judge,

The United States Attorney, by letter dated December 3, 1965, has applied to have the Court "seal the Grand Jury testimony" of Agent McDonald "as an exhibit for appeal".

Agent McDonald testified at the trial. The Court at a pretrial conference had directed that copies of the grand jury testimony of any witness at the trial be given before cross-examination to counsel for defendants. This, of course, meant grand jury testimony relating to the subject matter of the trial testimony of the witness.

It appears from the letter that Agent McDonald had testified before the grand jury but, apparently through inadvertence, this was not brought to the attention of the prosecuting staff trying the case at bar. The grand jury testimony was not given to counsel for defendants. After

the trial was concluded, that grand jury testimony was discovered by the prosecuting staff. The present application followed.

I have read the grand jury testimony. Pages MTC-1-3 inclusive, EJC-1 through line 15 of EJC-5 do not relate to the subject matter of the trial testimony; the balance of the grand jury testimony does so relate and if known at the trial would have been subject to the direction to turn over to counsel for defendants, whether inconsistent or not. From my reading of this balance of the grand jury testimony, there appear to be inconsistencies. I do not suggest one way or the other whether such inconsistencies are of any significance.

The application is granted therefore to the extent that (a) the United States Attorney is directed to supply copies to counsel for defendants of pages EJC-5 (beginning at line 16) through EJC-8 and (b) the United States Attorney is then directed to deliver the grand jury testimony to the Clerk who is directed then to seal it and to keep it so sealed for possible use on any appeal. The grand jury testimony of Agent McDonald is being returned to the United States Attorney for compliance with the foregoing.

So Ordered.

Dated: New York, New York
December 9, 1965

Inzer B. Wyatt
United States District Judge

Portions of Agent McDonald's Testimony at Trial

(1511) JOSEPH F. McDONALD, called as a witness by the government, having been first duly sworn, testified as follows:

Mr. Schweller: May I have a side bar conference?
The Court: Yes.

(At the side bar, out of the hearing of the jury.)

Mr. Schweller: For the record, your Honor, I wish to object to this agent taking the stand inasmuch as he has been present in court and he has listened to the testimony and he knows what has been going on here and he can shape his testimony. I want to make this for the record, your Honor.

The Court: Fine.

Objection overruled.

(In open court.)

Direct Examination by Mr. Stillman:

Q. Mr. McDonald, you are employed by the Federal Bureau of Investigation? A. Yes, I am.

Q. In what capacity? A. I am a special agent.

Q. How long have you been with the Federal (1512) Bureau of Investigation? A. Fourteen years.

Q. Directing your attention to July 19, 1962, were you engaged in your official duties on that day? A. Yes, I was.

Q. And specifically directing your attention to the vicinity of the noon hour, will you tell us where you were? A. I was in the New York office of the FBI at 69th Street and Third Avenue.

Q. Did you see anyone there? A. Yes.

Q. Did you see an individual by the name of Buddy Clott

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Portions of Agent McDonald's Testimony at Trial

there? A. Yes. I was introduced to an individual by the name of Buddy Clott.

Q. Did there come a time when you left the office? A. Yes.

Q. Where did you go? A. I went to the vicinity of 60th Street and Park Avenue.

Q. Will you tell us as best you recall, (1513) Agent McDonald, what you observed while you were there? A. Shortly before one o'clock I observed Buddy Clott standing on the corner, the northeast corner, of 60th Street and Park Avenue. At that time he was wearing a white shirt, dark pants, no hat. He stood there approximately 20 minutes, at which time another man approached him. I describe that man as white, male, about 45 years of age, five-ten, five-eleven, 175 to 180 pounds. He was wearing a dark suit, a tie, no hat.

They greeted one another and then they proceeded to walk south on Park Avenue. They walked to the entrance to the building which is address 505 Park Avenue, and that building is located at the northeast corner of 59th Street and Park Avenue.

The man who had approached Clott entered the building and Clott waited for him outside. Clott waited approximately 15 minutes, the man came out and rejoined Clott, and the two of them walked again south on Park Avenue to the intersection of 59th Street, and they turned left, which is an easterly direction, and they walked about half way up the block where there is a parking lot located (1514) on the north side of 59th Street. They entered the parking

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Portions of Agent McDonald's Testimony at Trial

lot, and I saw Clott speak to the attendant there, who then began to move automobiles around.

And Clott and the other man, the man whom he had met at the corner of 60th and Park, remained there in conversation.

I saw a third man come along and speak to Clott. This man I describe as about 40 years of age. He was five-ten or so. He was wearing an olive colored suit, as I recall, that day. He wore horn-rimmed glasses and dark hair, no hat.

He spoke briefly to Clott, and then he walked away from Clott and the other man; he walked back towards Park Avenue, in a westerly direction on 59th Street.

Shortly after he left, I saw Clott and the first individual that I mentioned enter a 1952 or 1953 Cadillac sedan. Clott was driving. The other man was the passenger, and they proceeded out of the parking lot, out the exit which leads them to 60th Street, and they turned left on 60th Street, and I didn't observe them further that day.

Mr. Friedland: If your Honor please, again may I move to strike out the answer as not (1515) binding upon the defendant Edwards. It is not connected to the defendant Edwards. And I ask that your Honor remind the jury about that.

The Court: I think I will leave any further reminder to the jury for my instructions at the close of the case, Mr. Friedland. I have explained the point to the jury before. I think it is not necessary to repeat it now. I will cover that in my charge.

And the objection is overruled.

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Portions of Agent McDonald's Testimony at Trial

Mr. Friedland: If your Honor please, may I have a continuing objection, under those circumstances?

The Court: Oh, yes, it will be understood that it is received as against your client, indeed as against all the defendants here on trial, tentatively, subject to the connection as I have already explained.

Mr. Schweller: Your Honor, is the answer finished? Is the answer to the last question finished now? I object on the ground—

The Court: I would assume—

Mr. Stillman: As far as I know.

Mr. Schweller: I object, your Honor—

(1516) The Court: Wait just a moment.

Had you completed your direct examination?

Mr. Stillman: I have another question or two.

The Court: All right.

Mr. Schweller: Subject to connection, I object. I don't see the relevance of this testimony.

The Court: But we have to proceed one step at a time. And if at the end of the government's case there isn't any connection of these events that the agent has narrated, I will entertain a motion to strike.

Mr. Schweller: Thank you, your Honor.

The Court: All right.

By Mr. Stillman:

Q. During the course of this trial, Agent McDonald, have you had occasion to see the first man that Clott met, and

Appendix C—Portions of Record Raising Constitutional Questions Below

Portions of Agent McDonald's Testimony at Trial

who subsequently went away in the car with him, in this courtroom? A. Yes, I have.

Q. When? A. Just a few minutes ago.

Q. Where was he seated? (1517) A. He was seated in the same seat that I am sitting in now.

Q. William Gladstone? A. That's correct.

Mr. Stillman: I have no further questions, your Honor.

The Court: Mr. Friedland?

Cross Examination by Mr. Friedland:

Q. Agent McDonald, is that the first time that you knew that Mr. Gladstone was the first man that you saw this day with Mr. Clott?

Mr. Stillman: Can I have the question read?

A. I don't understand your question.

Q. Isn't it a fact that you knew that it was Mr. Gladstone much before your coming to court today and testifying? A. Yes.

Q. When did you first find out it was Gladstone who was the unknown man you referred to? A. In the afternoon of July 19, 1962.

Q. In other words, the same day that you dictated your report you found out that Gladstone was the unknown man? A. You would have to let me see the report.

• • • • •

Comment on Petitioner's Failure to Testify

GOVERNMENT'S SUMMATION

(3059) Mr. Stillman: Thank you.

* * * * *

(3062) * * *

When Mr. Gelb summed up he said that he was going to address himself to the highlights and he was going to skip the details. Well, I submit to you what he very nicely skipped were the incriminating details, the details showing Max Jakob's knowing participation in this scheme. He forgot to mention, for instance, that William Gladstone testified, uncontradicted, that he, Gladstone, told Jakob on or about July 2nd—

Mr. Gelb: May I approach the sidebar, your Honor?

The Court: Yes.

(At the sidebar out of the hearing of the jury:)

Mr. Gelb: I move for the declaration of a mistrial on the ground that he made reference to the failure of the defendant Jakob to take the stand.

The Court: I am going to deny the motion, but I will explain it to the jury. I don't think, (3063) Mr. Stillman, that you should talk about the fact that he was uncontradicted about something dealing with Mr. Jakob.

Mr. Stillman: Very well, sir.

Mr. Gelb: Exception.

(In open court:)

The Court: Members of the jury, tomorrow, when I give you my instructions, I will have occasion to tell you a de-

fendant has the absolute right not to testify and that you are not to draw any inference unfavorable to the defendant by his failure to testify. Now if Mr. Stillman's suggestion was designed—and I don't think it was; I certainly think it was unintentional—to ask you for an inference unfavorable to Mr. Jakob because the testimony to which he referred of Mr. Gladstone was uncontradicted, I will have to tell you to disregard it and to draw no such inference. We will cover it tomorrow in our instructions. That is enough for the present.

• • • • •

APPENDIX D

Judgments of the Courts Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of September, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Robert J. Dodge, et al.,
Defendants,

Robert Edwards, a/k/a Edward Schonberger,
Milton Parness, Max Jakob, John J. Lombardozzi,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

Appendix D—Judgments of the Courts Below

(U. S. A. *v.* Jakob)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 64 Cr. 619

UNITED STATES OF AMERICA

v.

MAX JAKOB

On this 16th day of December, 1965, came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly transporting and causing to be transported in interstate commerce, stolen securities of a value of more than $5,000., knowing the same to have been stolen, converted and taken by fraud and conspiracy so to do. (Title 18, U. S. Code, Sections 2314, 2 and 371) as charged in counts 1 and 2

and

the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR and ONE (1) DAY on each of counts 1 and 2 to run concurrently with each other, and FINED $10,000. on each of counts 1 and 2.

TOTAL FINES OF $20,000, to be paid or defendant to stand committed until the fines are paid or he is otherwise discharged according to law.

Bail pending appeal is fixed in the sum of $15,000.

Defendant released in custody of his attorney until 10:00 A.M. December 17, 1965 to post bail pending appeal.

Execution of judgment is stayed pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Inzer B. Wyatt
United States District Judge

James E. Valeche
Clerk

APPENDIX E

Conflicting Opinions

Bergman v. U.S.A., 253 F. 2d 933

Sidney BERGMAN, George Goldenberg, Emanuel Weiss and Phillip Weiss,
Appellants,

v.

UNITED STATES of America,
Appellee.

Nos. 13193-13196.

United States Court of Appeals
Sixth Circuit.
March 12, 1958.

Rehearing Denied April 23, 1958.

* * * * *

Before McALLISTER and STEWART, Circuit Judges, and JONES, District Judge.

STEWART, Circuit Judge.

Tried by jury in the district court, the appellants were convicted of violating Title 18, U.S.C.A. §§ 2314 and 2315, by receiving and transporting in interstate commerce goods which they knew had been stolen, feloniously converted or taken by fraud, and of conspiracy to violate the said criminal statutes. Upon these consolidated appeals many errors are claimed in the trial court's admission and exclusion of evidence, instructions to the jury, and other rulings.

Appendix E—Conflicting Opinions

Bergman v. U.S.A., 253 F. 2d 933

Two principal contentions, however, emerge from the briefs and oral argument. First, it is claimed that the proof was insufficient to show that the goods which were received and transported had been obtained by any of the unlawful means referred to in the criminal statutes in question. Secondly, it is contended that in the light of Jencks v. United States, 1957, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, the district court erred in not permitting defense counsel to inspect prior statements made to the Federal Bureau of Investigation by witnesses who testified for the government.

The goods which the appellants were charged with receiving and transporting were automobile parts that in 1952 had been shipped in four separate loads from Willys-Overland Motors, Inc., to the appellant Phillip Weiss in Toledo, Ohio. Since for the reasons stated below we have concluded that the judgments must be set aside, it is unnecessary to embark upon a review of the conflicting evidence as to the circumstances under which the goods in question left the Willys-Overland plant. Suffice it to say that while the appellants are correct in their contention that the evidence did not show that a common law larceny had been committed, such a showing was not necessary to sustain a conviction. United States v. De Normand, 2 Cir., 1945, 149 F. 2d 622; United States v. Handler, 2 Cir., 1944, 142 F. 2d 351.

The issue as to whether the goods were obtained by one of the unlawful methods of acquisition referred to in the statutes is not to be decided upon the basis of technical common law definitions. See United States v. Turley, 1957, 352 U. S. 407, 77 S. Ct. 397, 1 L. Ed. 2d 430; United States v. De Normand, supra; United States v. Handler, supra.

While, of course, we cannot know whether the evidence to be produced at a new trial will be sufficient to support convictions, there is enough in the present record to prevent a determination at this time that any of the appellants are entitled to directed verdicts of acquittal. Cf. Yates v. United States, 1957, 354 U. S. 298, 332-333, 77 S. Ct. 1064, 1 L. Ed. 2d 1356.

We come then to the ground upon which we have concluded that a new trial is required. Six employees of Willys-Overland testified on behalf of the government. The general subject of their testimony related to the manner in which Phillip Weiss had secured possession of the automobile parts—a subject which was a central issue in the case. Five of these six witnesses said that they had given statements to the F.B.I. in 1952 or early in 1953 covering the subject matter of their testimony. Defense counsel made a timely demand for the production of each of the five statements for use in cross examination.

In a conscientious effort to follow the law as it then appeared to be, the trial court adopted the following principles in passing upon counsel's requests for the witnesses' prior statements: 1. If the witness had used the statement to refresh his recollection, the statement would be made available to defense counsel. 2. If the witness had not used the statement to refresh his recollection, the court would examine the statement to determine whether its contents were inconsistent with the witness's testimony. 3. If the court determined that the statement was inconsistent with the witness's testimony the statement would be made available

to defense counsel. 4. If the court found that the statement was not inconsistent with the witness's testimony the statement would not be made available to defense counsel.

Applying these standards, the court made available to the defense the prior statements of three of the government witnesses and a substantial part of the statement of a fourth. But the prior statement of one witness, Chitwood, was not turned over to defense counsel.

Several months after the judgments of conviction were entered, the Supreme Court decided Jencks v. United States, 1957, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103. In that case the Court expressly disapproved the procedure adopted by the district court here. 353 U. S. at page 669, 77 S. Ct. at page 1013. In the light of the Jencks decision, the failure of the district court to make Chitwood's prior statement available to the defense requires that the judgments be set aside.[1] We reach this conclusion with reluctance in view of the likelihood that the failure to make Chitwood's statement available actually worked no prejudice to the defendants, and in view of the generally conscientious and fair conduct of the long and complicated trial by the district judge.

Upon a second trial the recently enacted statute implementing the rule of the Jencks case will govern the procedure to be followed. 18 U.S.C.A. § 3500; Lohman v. United States, 6 Cir., 1958, 251 F. 2d 951.

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[1] The fact that Chitwood's statement may have been unsigned is immaterial, if it was "otherwise adopted or approved by him," or, if orally made, it was a substantially verbatim contemporaneous recording. Jencks v. United States, 353 U.S. at page 668, 77 S.Ct. at page 1013; 18 U.S.C.A. § 3500.

The judgments are vacated and the case remanded to the district court for a new trial.

On Petition for Rehearing

PER CURIAM.

Upon consideration of the petition for rehearing, we are of opinion that it is not proper for this court to determine whether the appellants were prejudiced by failure to make available the prior statement of a witness, any more than it would be proper for the trial court to determine whether a prior statement of a witness should be turned over to defense counsel on the basis of whether the statement is inconsistent with the witness's testimony in open court.

The petition for rehearing seems to imply that the Jencks case removed this function from the district court only to place it within the province of the Court of Appeals. We are not disposed to adopt that view, and accordingly the petition for rehearing is denied.

Appendix E—Conflicting Opinions

U.S.A. v. Prince, 264 F. 2d 850

UNITED STATES of America

v.

James William PRINCE, Appellant.

No. 12785

United States Court of Appeals

Third Circuit.

Argued Feb. 18, 1959.

Decided March 18, 1959.

* * * * *

Before BIGGS, Chief Judge, and GOODRICH and MCLAUGHLIN, Circuit Judges.

MCLAUGHLIN, Circuit Judge.

Appellant was convicted for selling and facilitating the concealment and sale of narcotic drugs on or about April 10, 1958, in violation of 21 U.S.C. § 174. He was sentenced as a second offender to ten years imprisonment under the mandatory provisions of Section 174.

His first point concerns the government's alleged failure to comply with the trial court's direction to produce statements of a government agent in accordance with 18 U.S.C. § 3500. Agent Hill of the Federal Bureau of Narcotics was a trial witness for the government. On direct examination he testified that on April 10, 1958 he arranged by telephone to purchase three spoons of heroin from Prince for $60 and to send Randolph Jackson, a special government employee and a friend of Prince, to the latter with the money for the

drug. According to the government evidence that sale was consummated. At the opening of the cross-examination Mr. Hill was questioned and answered as follows:

> "Q. Mr. Hill, did you make written reports pertaining to the subject matter you have just testified? A. I have a written report, for April 10th, the actual date of the sale.
>
> "Mr. McVay: Your Honor, I request those reports.
>
> "The Court: Do you have it there?
>
> "Mr. Shannon: Yes.
>
> "Mr. McVay: Your Honor, may I have a recess so that I will have time to look at these reports?
>
> "The Court: How long are they, Mr. Shannon?
>
> "Mr. Shannon: Approximately a page and a half. You can read it in a couple of minutes I imagine.
>
> "The Court: Go ahead. We will let you take time to read it, Mr. McVay."

As the result of the above a report by Mr. Hill of his activities on April 10, 1958 with reference to Prince was produced and furnished defense counsel. On redirect examination Mr. Hill was asked if he had talked with Prince after April 10th. He said he had and he was requested to relate the conversation. This was objected to. The court asked the district attorney its purpose and the reply was "The purpose of it is to show the subsequent similar conduct." The court allowed the evidence over further objection.[1]

---

[1] Where evidence of similar acts or conduct is allowed to show knowledge, wilfulness and intent as in this instance, the fact that they occurred subsequent to the crime named in the indictment is no bar to admissibility of the evidence. United States v. Stirone, 3 Cir. 1958, 262 F. 2d 571, 576, rehearing denied Jan. 27, 1959.

Mr. Hill then told that on April 28, 1958 he had talked with William E. Jackon, referred to in the record as a drug seller, and Prince together. He said:

> "I spoke to them. I told them that I was looking to buy more heroin. William E. Jackson turned to the defendant and asked the defendant did he want to take care of me. The defendant said, 'I am still suspicious that he is a narcotic agent. I want to sell to him but I don't want to put it in his hands although I want the money.' William Jackson said, 'If you don't want to take care of him I will.' Then William Jackson and I left the Snack Shop."

There actually had been a written report of the April 28th conversation and related incidents by Agent Hill. It was produced at the hearing on defendant's motion to appeal in forma pauperis. The district judge in his opinion with respect to that motion said: "It is true that upon defense counsel's request, pursuant to 18 U.S.C.A Sec. 3500, *only one of two reports covering matters about which narcotics agent Hill had testified was delivered to him.*" (Emphasis supplied).

The statute governing the matter, 18 U.S.C. § 3500(b), provides in part: "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." This language is hardly ambiguous and the legislative history of

Section 3500 leaves no doubt as to its intent. Senate Report No. 981 states: " * * * the proposed legislation * * * reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in the possession of the Government touching the events and activities as to which a Government witness has testified at the trial * * * " U. S. Code Congressional and Administrative News 1957, p. 1861.

The district judge, though conceding the right of the defense to the second report, thought that it "could not conceivably have produced a different verdict."

In our view the mandate of the statute itself makes the omission substantial. It is not the function of the district court or ourselves to determine whether the appellant was prejudiced by failure to make available the relevant portions of the prior report of the witness. Bergman v. United States, 6 Cir.; 1958, 253 F. 2d 933, 935, 936. In Lohman v. United States, 6 Cir., 1958, 251 F. 2d 951, 953, the factual situation was much the same as here. A written report to the Federal Bureau of Investigation had been made by the witness concerning matters to which he had testified. The request of the defense for the report was denied by the trial judge. Mr. Justice Stewart, then Judge Stewart, who also wrote the Bergman opinion, held for the court that this was "clearly prejudicial error". And see Johnston v. United States, 10 Cir., 1958, 260 F. 2d 345, 347.

Appellant also suggests serious error in the failure of the court to instruct the jury that if the defendant was a

procuring agent he could not be convicted under the indictment.

One of the defenses was that Prince had acted as agent of either Hill or Randolph Jackson in the purchase of the heroin on April 10th. Admittedly if that were the fact he could not have been convicted under the indictment. The defense therefore presented the following request to charge:

> "If you believe that the Federal Agent (Charles G. Hill) or the informer, who acted under instructions and authority of agents of the Federal Bureau of Narcotics, asked the defendant to get some heroin for him and thereupon the defendant undertook to act in the prospective purchaser's behalf rather than his own, and in so doing purchased the drug from a third person with whom he was not associated in selling, and thereafter delivered it to the buyer, the defendant would not be a seller and could not be convicted under this indictment".

The court charged: "In determining whether the defendant was a seller of narcotics, you must keep in mind the difference between dealing with a purchaser as a seller of narcotics and acting for him as a procuring agent. If you find that the defendant undertook to act in behalf of a prospective purchaser rather than in his own behalf, and in so doing purchased the drug from a third person with whom he was not associated in selling and thereafter delivered it to the buyer, the defendant would not be a seller and could not be convicted of a *sale* under the indictment."(Emphasis supplied.) After the charge had been concluded, the court asked counsel if they had any further

requests to charge. The defense attorney said, "I would request an instruction to the effect if he was a procuring agent he is not guilty." The court said, "You have that instruction." Counsel replied, "He is not guilty under facilitating or anything else." The court, saying "You have that. That is clearly in there", sent the jury to the jury room to deliberate upon its verdict.

Under the facts the requested instruction was proper. United States v. Sawyer, 3 Cir., 1954, 210 F. 2d 169, 170; Adams v. United States, 5 Cir., 1955, 220 F. 2d 297, 298, 299; United States v. Dornblut, 2 Cir., 1958, 261 F. 2d 949, 951. It was apparently so accepted by the court but unfortunately the latter mistakenly thought the charge had covered it. As given, the instruction did not eliminate a verdict of guilty for facilitating the sale in the event Prince was found to have merely acted as agent for Hill or Jackson in purchasing the drug. The difference to Prince in the instruction could have been the difference between winning and losing the case.

Appellant's final point is that the admission of prior similar offenses was erroneous. The evidence was offered to show knowledge, wilfulness and intent and was admissible. The rule governing it is tersely stated by Judge Goodrich in United States v. Stirone, supra [262 F. 2d 576], "Evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime."

The judgment of the district court will be reversed and the cause remanded for a new trial.

Appendix E—Conflicting Opinions

U.S.A. v. Sheer, 278 F. 2d 65

UNITED STATES of America,

Plaintiff-Appellee,

v.

Robert SHEER, Gordon Foster and Thomas Jackson, Defendants-Appellants.

Nos. 12826-12828.

United States Court of Appeals

Seventh Circuit.

May 10, 1960.

* * * * *

Before DUFFY, SCHNACKENBERG and CASTLE, Circuit Judges.

SCHNACKENBERG, Circuit Judge.

Robert Sheer, Gordon Foster and Thomas Jackson, defendants, appeal from judgments of conviction in the district court entered on jury verdicts. Sheer was sentenced to concurrent five year terms of imprisonment under counts I, II, V and IX, to concurrent three year terms under counts IV and VI, and was fined $5,000 and costs under count V. Foster was sentenced to concurrent five year terms of imprisonment under counts VII and IX and was fined $5,000 and costs under count IX. Jackson was sentenced to one year imprisonment and costs under count VIII of the indictment, and under count IX his sentence was suspended and he was placed on probation.

As stated by defendants, the errors relied upon arise out

of the overruling of each defendant's motion for judgment of acquittal at the close of the entire case, the improper admission of evidence on behalf of the government, the refusal to limit statements attributed to one defendant to the declarant, the refusal to grant a severance or a mistrial as to Foster and Sheer after admitting into evidence against Jackson a statement attributed to him, the refusal to allow defendants to have certain internal revenue reports for the purpose of cross-examining government agents, the refusal to allow defendants to have the grand jury testimony of certain witnesses for the purpose of cross-examination, the giving of erroneous instructions, the failure to give certain instructions offered by defendants, the excessive sentences, the failure of the court reporter to transcribe the entire proceedings, the improper selection of the grand jury and the overruling of motions to quash two search warrants and to suppress the evidence seized under those warrants.

The making of false statements in a matter within the jurisdiction of the United States Treasury Department was charged against Sheer in counts I, II, and IV, against Foster in count VII and against Jackson in count VIII. Sheer was therein charged with falsely stating on March 26, 1957, May 6, 1957 and July 3, 1956, that he had no employee or agent accepting wagers on his behalf. Foster was accused of falsely stating on May 6, 1957, to Special Agents conducting a criminal investigation that he never accepted wagers, and that he had no business interest in the Roberts Motel and Bar. Jackson was accused of making a statement on May 6, 1957, that he did not accept wagers. Count V charged that on May 29, 1957, Sheer attempted to evade the payment of

wagering excise taxes due for April, 1957, by filing a wagering excise tax return listing the gross wagers accepted by him as $1,851.00 and the tax as $181.50, when he knew the "gross amount of wagers accepted by him" during that month was $2,365.00 and more and the tax due was $236.50 and more. Count VI charged Sheer with subscribing and filing a tax return application for registry-wagering, on July 3, 1956, falsely declaring under the penalties of perjury that it was true, correct and complete when it did not describe his place of business, and stated he did not engage any employee or agents in receiving wagers in his behalf.

Count IX charged that, on or about November 1, 1955, or prior thereto and continuing up to and including the indictment date (July 25, 1957), defendants did unlawfully conspire "to defraud the United States in its administration of the Internal Revenue Laws and to violate Sections 7201, 7203, 7206, 4411, 4412, 4901, 7262" of Title 26 and Section 1001 of Title 18 U.S.C. The indictment then alleged certain matters as a part of the conspiracy. It charged as overt acts each of the other counts of the indictment and three additional overt acts.

As above stated, counts II, VII and VIII charged, respectively that defendants Sheer, Foster and Jackson knowingly made a false and fraudulent statement of a material fact to Special Agents of the Internal Revenue Service on May 6, 1957.

The statute alleged to be violated, 18 U.S.C.A. § 1001, provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States know-

ingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Upon the trial, all of the principal government witnesses were agents of the government. After the direct examination of each of these witnesses, defendants demanded the right to inspect the reports which the agents had made. Defendants were given statements of the agents which were made contemporaneously with the events reported[1] but, under the court's ruling they were denied other statements. It was the government's position that "we will supply memoranda taken down in questioning defendants at the time of the questioning that took place but we will not show the Internal Revenue *reports* relating to such things or such interviews with the defendants other than verbatim statements reported". (Emphasis supplied.) The court's view was that the defendants "will be entitled to copies of written statements made contemporaneously with the interviews".

After Agent William Edwards testified as to a raid at the Roberts Motel, defendants made a request for his report of what took place during the raid, which request was denied. Agent Donald Yerly testified in substance that he inspected

[1] However, a statement by Agent Glen Johnson was not produced because it had been lost.

the building at 929½ Missouri Avenue on May 7, 1957, and that he observed smoke in room 5 as well as ashes in a wastebasket which was warm. Across the street was a car in which he had seen Sheer riding. On the same day, after he returned to the office, Yerly made a memorandum report of what he had seen. A request by defendant for production of this report was denied by the court, without stating the ground for its ruling.[2]

[1] The demand for these reports was made for the purpose of impeaching government agents Edwards and Yerly who had completed their testimony on direct examination. Palermo v. United States, 360 U.S. 343, 345, 79 S. Ct. 1217, 3 L. Ed. 2d 1287. Defendants rely upon the Jencks Act, 18 U.S.C.A. § 3500, which provides:

> "§ 3500. Demands for production of statements and reports of witnesses
>
> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

[2] While it is not clear from the record that the district court denied production of the reports of Edwards and Yerly because they were not made contemporaneously with the events recounted therein, and while the evidence indicates rather strongly that these reports were made so soon after those events that they were as a matter of fact contemporaneous therewith, we are for the purpose of this case accepting the government's contention that these statements were "not made contemporaneously with the interview on the subject matter" thereof.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

* * * * * *

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

We have held that this Act applies to government agents who testify for the prosecution in federal criminal cases. United States v. Berry, 7 Cir., 1960, 277 F. 2d 826.

[2] We find that the term "statement" as used in the Act applies to the reports made by the agents in this case. A report is defined as "a statement in writing of proceedings and facts exhibited by an officer to his superiors". Webster's Dictionary.

Neither the wording of the Act nor its legislative history indicates any intention of protecting government agents

from impeachment when they become witnesses for the government at a trial. If, subject to the safeguards set forth in the Act, the defense is permitted to test the credibility of a government agent when he appears as a witness, the purpose of the law in securing a fair trial is more nearly attained. If an agent's written reports as to matters about which he has testified on direct examination are at variance with his testimony, a well-established ground for impeachment exists. 98 C.J.S. Witnesses § 482, p. 365. Of course, it is necessary that a foundation for impeachment first be laid by the cross-examiner. 98 C.J.S. Witnesses § 599, p. 589. Accordingly, in the case at bar, after Edwards and Yerly, two of the principal witnesses for the government, had each completed his direct testimony, a demand was made by defense counsel for production of their reports but an objection thereto was sustained by the district court. As to the contention of the government, which we are assuming has a factual basis in the record (see footnote 2, ante), that these reports were not made contemporaneously with the events therein referred to, we hold that the *time* of their making was not germane to their use as a basis for impeachment. They were statements made by the witnesses Yerly and Edwards as referred to in § 3500(e)(1). They were *not* statements such as those referred to in § 3500(e)(2).

The government contends that defendants are in no position to object to the court's rulings in this respect because they did not move to have the questioned statements marked as exhibits for consideration on appeal. They add that

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"This should have been done for if the defense is not prejudiced by the withholding the error is harmless." However, it affirmatively appears in the record that defense counsel inquired as to whether the reports were present in the courtroom or available and the response was in the negative. Upon oral argument it was stated to this court, and not denied, that these documents were not physically in the courtroom at the time of the proceedings referred to. Just how the defense attorney could have had the absent statements marked as exhibits by the court reporter does not appear.

Substantial error was committed in the nonproduction of the reports of Edwards and Yerly for use by defendants in their defense in the district court. It is not proper for this court to determine whether defendants were prejudiced by failure to make available to them the prior statements of Yerly and Edwards, any more than it would be proper for the trial court to determine whether a prior statement of a witness should be turned over to defense counsel on the basis of whether the statement is inconsistent with the witness' testimony in open court. Bergman v. United States, 6 Cir., 253 F. 2d 933, 936. A reversal of the judgment is required. A remandment for a new trial will be ordered.

In view of that disposition of the appeal, it becomes unnecessary to consider the other grounds urged by defendants in this court.

Reversed and remanded for a new trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 766

MAX JAKOB, PETITIONER

v.

UNITED STATES OF AMERICA

No. 973 MISC.

MILTON PARNESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 366 F. 2d 853.

[1] "Pet. App." refers to the Appendices to the petition in No. 766.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1966. Mr. Justice Harlan extended the petitioners' time for filing petitions for writs of certiorari to November 11, 1966 (a holiday). Petitioner Jakob filed his petition on that date, and petitioner Parness filed his petition on November 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Both petitioners present the following question:

1. Whether the inadvertent failure of the government to turn over to the defense minutes of the grand jury testimony of one witness, whose testimony was of minimal significance, requires reversal of the convictions.

Petitioner Jakob (No. 766) raises the following additional question:

2. Whether a comment by the prosecutor during summation that certain evidence was "uncontradicted" constitutes reversible error.

Petitioner Parness (No. 973 Misc.) presents the following additional questions:

3. Whether his previous conspiracy conviction barred his prosecution for the conspiracy charged here.

4. Whether the court properly admitted evidence relating to incriminating statements recorded (by a monitoring device installed in the hotel room of an

undercover F.B.I. agent) in the course of petitioner's attempt to sell stolen securities to the agent.

5. Whether the invocation of the privilege against self-incrimination by a government witness resulted in reversible error.

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of New York of transporting stolen securities in interstate commerce in violation of 18 U.S.C. 2314, 2315, and of conspiring to do so in violation of 18 U.S.C. 371. On December 16, 1965, petitioner Jakob was sentenced to imprisonment for one year and one day on both counts, the terms to run concurrently, and was fined $10,000 on each count. Petitioner Parness was sentenced to imprisonment for four years on each count, the terms to run concurrently. The court of appeals affirmed.

The evidence (the sufficiency of which is not challenged here) showed that petitioners, fourteen co-defendants and other co-conspirators were engaged in a scheme to dispose of about one million dollars worth of securities stolen from the brokerage firm of Bache & Co. The facts are summarized in considerable detail in the court of appeals' opinion (Pet. App. A–10 to A–29). Briefly, the evidence revealed that, by various means and in concert with various other co-conspirators, both petitioners agreed to distribute the stolen stock and engaged in efforts to effect its distribution.

The conspiracy terminated as the result of events in the latter part of July 1962. After learning that a "big buyer" from the West Coast was interested in purchasing a large portion of the securities, co-defendant Gladstone communicated with petitioner Jakob and another defendant (J.A. 369–370)[2] and arrangements were subsequently made for a meeting with this "buyer" (J.A. 272–274, 348–349). On July 20, F.B.I. agent DeSena, posing as the buyer from the West Coast, took a room at the Robert Treat Hotel in Newark, New Jersey. That afternoon, he was visited in his room by petitioner Parness, co-defendants Lombardozzi and Martinelli, and co-conspirator Clott. After some negotiations about price, petitioner Parness left the room in order to obtain the securities (G. 56–57, 85–86). Shortly thereafter, co-defendant Carbone entered the room with eighteen of the stolen one-hundred-share certificates, having a face value of approximately $176,000 (G. 58–60). After DeSena left, obstensibly in order to return with full payment, other federal agents, who had monitored the conversations through a listening device in agent DeSena's room, entered the room and arrested Lombardozzi and Martinelli. Other members of the conspiracy were apprehended on later dates.

ARGUMENT

At trial, co-defendant Gladstone testified that, on July 19, 1962, he met co-defendant Clott on a street

[2] The designation "J.A." refers to the appendix for petitioner Jakob, "G." to the government's appendix, "Tr." to the trial transcript, which we are lodging with the Clerk of this Court, and "Ex." to petitioner Parness' Exhibit B.

corner; that they proceeded to co-defendant Sessler's office building; that, while Clott waited on the street, he went in and got from Sessler a list of stocks to be offered the West Coast buyer; and that he then rejoined Clott and gave him the list (J.A. 346). F.B.I. agent McDonald corroborated this evidence by his testimony that he had observed Gladstone and Clott meet on the corner and that he saw Gladstone enter the building and thereafter rejoin Clott (Pet. App. A–54 to A–58).

Approximately three weeks after trial, grand jury testimony of McDonald was discovered by the United States Attorney in another file which was being prepared for the prosecution of two other defendants. Immediately upon discovery of this testimony, a letter was sent to the trial judge (Pet. App. A–47), and the testimony was forwarded to his chambers. This testimony, which was turned over to the defense prior to being sealed for purposes of appeal, contained insignificant differences from the agent's trial testimony.[3] On motions to set aside the verdict, the trial court denied relief on the ground that, even if McDonald's testimony were completely discredited, it would have no effect upon the verdict (G. 69–70). The court of appeals affirmed that ruling.

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[3] Before the grand jury, McDonald said that Gladstone met Clott on the southeast corner of the intersection; at trial he stated it was the northeast corner. His description, before the grand jury of the man with Clott was "approximately forty years of age, five-eight, a hundred-sixty, a hundred-seventy pounds." His description at trial was "about 45 years of age, five-ten, five-eleven, 175 to 180 pounds." In both instances, McDonald definitely identified the man in question as Gladstone. See Pet. App. A–49, A–55.

Agent McDonald's testimony, merely corroborating the fact that Gladstone and Clott met, was of minimal significance at the trial. Hence the inadvertent error in failing to turn over the grand jury testimony does not require reversal of petitioners' convictions. Petitioners have failed to show that any prejudice may have resulted from their lack of access to McDonald's grand jury testimony. The case is thus wholly unlike the situation in *Dennis* v. *United States*, 384 U.S. 855, where the court had refused to turn over the grand jury testimony of important government witnesses. In the present circumstances, the ruling of the lower courts was clearly correct. See *Rosenberg* v. *United States*, 360 U.S. 367; *United States* v. *Kahaner*, 317 F. 2d 459, 473 (C.A. 2), certiorari denied, 375 U.S. 836 (harmless error in failing to turn over Jencks Act material).[4] As this Court noted in *Rosenberg*, where, as here, the information not presented to the defense at trial is patently insignificant, the courts are not required to overturn the conviction.

2. In the closing argument, government counsel said (Pet. App. A–59):

> When Mr. Gelb summed up he said that he was going to address himself to the highlights and he was going to skip the detail. Well, I submit to you what he very nicely skipped were the incriminating details, the details

[4] Two of the cases relied on by petitioners for the view that the harmless error rule does not apply in cases such as this (Pet. App. E) were decided before this Court's decision in *Rosenberg*. The third, *United States* v. *Sheer*, 278 F. 2d 65 (C.A. 7), involved the erroneous withholding of Jencks Act statements of two crucial government witnesses.

> showing Max Jakob's knowing participation in this scheme. He forgot to mention, for instance, that William Gladstone testified, *uncontradicted,* that he, Gladstone, told Jakob on or about July 2nd—[Emphasis added].

Jakob's attorney interrupted and moved for a mistrial on the ground that government counsel made reference to the failure of Jakob to take the stand. The motion was denied, and the court, without objection, charged the jury (Pet. App. A–59–A–60; G. 66–67):

> Members of the jury, tomorrow, when I give you my instructions, I will have occasion to tell you a defendant has the absolute right not to testify and that you are not to draw any inference unfavorable to the defendant by his failure to testify. Now if Mr. Stillman's suggestion was designed—and I don't think it was; I certainly think it was unintentional—to ask you for an inference unfavorable to Mr. Jakob because the testimony to which he referred of Mr. Gladstone was uncontradicted, I will have to tell you to disregard it and to draw no such inference. We will cover it tomorrow in our instructions. That is enough for the present.

The comment by the government counsel does not warrant reversal of Jakob's conviction. The rule which prohibits comment on the defendant's failure to testify in his own behalf does not forbid argument to the effect that the evidence is "uncontradicted", unless it is shown that the argument was manifestly intended to comment on the defendant's failure to testify. *Smith* v. *United States,* 234 F. 2d 385, 389

(C.A. 5); *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10); *Garcia* v. *United States*, 315 F. 2d 133 (C.A. 5). No such showing was made here. Moreover, the court's clear instruction to the jury obviated any possible prejudice. *United States* v. *Stromberg*, 268 F. 2d 256, 271 (C.A. 2), certiorari denied, 361 U.S. 863; *United States* v. *De Vasto*, 52 F. 2d 26 (C.A. 2), certiorari denied, 284 U.S. 678; *Sterling* v. *United States*, 333 F. 2d 443, 449–450 (C.A. 9). Petitioner's argument that the court's charge improperly emphasized his failure to testify in his own behalf (see *Stewart* v. *United States*, 366 U.S. 1, 9–10) is insubstantial and, in any event, comes too late, since petitioner failed to object to these curative instructions.[5]

3. Petitioner Parness contends that he was previously convicted on Count 1 of the indictment—the conspiracy charge—and thus, that the present proceeding placed him twice in jeopardy for the same offense. In the trial below, Parness was convicted on both the conspiracy count and the substantive count of interstate transportation of stolen property, and the sentences were ordered to run concurrently. Since petitioner does not, and cannot, challenge his conviction on the substantive count on double jeopardy grounds, there is no need to review the validity

[5] Petitioner Jakob appears to suggest (Pet. 6) that an exception was taken to the court's curative instructions. It is clear, however, that the exception taken was only to the denial of a motion for a mistrial (see Pet. App. A–59). In any event, there was surely no specific exception (as required by Fed. R. Crim. P. 30) on the ground that the instruction unduly called attention to petitioner's failure to testify.

of the conviction on Count 1. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Lawn* v. *United States*, 355 U.S. 339.

In addition, this contention is without merit. Petitioner was previously convicted in the United States District Court for the District of New Jersey on an indictment charging that he and one J. Tom Grimmett, from June 1961 to March 1962, conspired with each other and with other persons to violate 18 U.S.C. 2314.* The indictment further stated (Ex. 7):

> It was further a part of the aforesaid conspiracy that approximately $1,000,000 of stolen securities would be sold by MILTON PARNESS and others * * * to J. TOM GRIMMETT and would be forged, altered, counterfeited and then pledged as collateral for loans.

In response to a bill of particulars (Ex. 11), however, the government limited the scope of the conspiracy count charged in the indictment to an agreement to transport approximately $50,000 of securities stolen from the homes of Bernard Hans and Fred W. Plate, between New York City, East Paterson, New Jersey, and Oklahoma City, Oklahoma (Ex. 12–13). There was evidence introduced at the New Jersey trial that Parness was said to have a batch of securities, valued at approximately $1,000,000, available for sale on the open market on January 2, 1962 (*e.g.*, Ex. 96, 110, 112, 222, 224–225, 333). It is on the basis of this evidence that Parness claims that the subject matter of both

* The court of appeals affirmed *per curiam* (331 F. 2d 703), and this Court denied certiorari. *Parness* v. *United States*, 377 U.S. 993.

trials was the same and that there was but one conspiracy, commencing on June 1, 1961, and terminating upon return of the present indictment.

After comparing the indictment and the evidence produced in the present proceeding with the charge and evidence in the former, the courts below found Parness' double jeopardy claim to be without merit. This ruling was clearly correct. Parness was not tried in the New Jersey trial for conspiring to transport $1,000,000 of stolen securities. Rather, he was tried and convicted of conspiring to transport the $50,000 of securities stolen from the homes of Hans and Plate—a separate and distinct offense from that involved here. Even if $1,000,000 of securities could be said to have been involved in the New Jersey case, it is clear that that conspiracy was different from the one involved in this case. In the New Jersey case, it was established that Grimmett was the intended distributee of the stolen securities; that the intended date of distribution was January 2, 1962; and that the interstate transportation involved shipment between New York City, East Paterson, New Jersey, and Oklahoma City, Oklahoma. Here it was proved that Parness' intended distributees were Jakob, Gladstone and Sessler; that the conspiracy contemplated distribution in June and July 1962; and that the interstate transportation involved shipment from New York City to Newark, New Jersey. Parness failed to meet his burden of showing that the two trials involved the same conspiracy. *Sanchez* v. *United States*, 341 F. 2d 225, 227 (C.A. 9); *Reid* v. *United States*, 177 F. 2d 743, 745 (C.A. 5).

4. When Agent DeSena posed as the buyer from the West Coast, the F.B.I. rented two adjoining rooms at the Robert Treat Hotel. A microphone was placed in DeSena's room and recording equipment was placed in the adjoining room. When Parness attempted to sell stolen securities in DeSena's room, the entire conversation, including incriminating statements made by Parness (G. 79–91), was recorded by agents next door. At trial, agent DeSena testified to these circumstances, without objection, and the transcript of the recording was thereafter offered into evidence.

Petitioner Parness contends that the incriminating statements, to which DeSena testified, were obtained in violation of his Sixth Amendment right to counsel, and that therefore the statements were inadmissible into evidence. Since petitioner failed to object to the testimony of DeSena, he cannot now raise that issue on appeal. *United States* v. *Indiviglio*, 352 F. 2d 276, 279 (C.A. 2), certiorari denied, 383 U.S. 907. In any event, there is no merit to petitioner's contention. That Parness was under indictment for the conspiracy which was the subject of his New Jersey trial (*supra*, pp. 8–10) at the time his statements in DeSena's hotel room were recorded is not material. The recordings were not introduced in the New Jersey trial, and the statements recorded in no way related to the other conspiracy. Rather the statements revealed Parness' complicity in the scheme to dispose of the Bache securities. Parness was not under indictment for his role in the Bache conspiracy at the time

of his conversation with DeSena; indeed the fact of his complicity was not then known by the government. The recorded statements were not merely admissions of previous criminal conduct; they were part and parcel of an aborted attempt to fulfill the objects of the Bache conspiracy. The decisions relied on by petitioner[1] prohibit only the eliciting of incriminating statements from an accused, under certain circumstances, about a crime which he is charged with, or suspected of, having committed; they do not bar the prevention and detection of subsequent crimes.

Petitioner further argues that the introduction of the tape recording of his conversation violated his Fourth Amendment rights. This recording, however, which corroborated DeSena's testimony at trial, was clearly admissible. *Osborn* v. *United States,* No. 29, this Term (decided December 12, 1966); *Lopez* v. *United States,* 373 U.S. 427. The conversation was recorded with the consent of the occupant of the room [DeSena], and the tape recording served only to support the credibility of DeSena by corroborating his testimony as to the substance of the conversations. Cf. *Lopez* v. *United States,* 373 U.S. 427, 442 (Warren, C.J., concurring in result). Indeed, the present case is stronger than either *Osborn* or *Lopez,* for here there is no possible question as to the legality of an entry onto the property of the defendant. Petitioner voluntarily entered a room rented and occupied by DeSena. Clearly, in these circumstances "the use by [the agent] of a device to make an accurate record of

[1] *Massiah* v. *United States,* 377 U.S. 201 *Escobedo* v. *Illinois,* 378 U.S. 478; *Miranda* v. *Arizona,* 384 U.S. 436.

a conversation about which [he] later testified" did not violate petitioner's constitutional rights. *Osborn v. United States, supra,* slip opinion, p. 4.

5. On the second day of trial, Gordon Tallman (who had previously been convicted of larceny in connection with the Bache securities) was called as a witness for the government. The following colloquy then occurred (J.A. 64):

> Mr. TALLMAN: If it please the court, I don't plan on giving testimony in this case.
>
> The COURT: You refuse to take the oath?
>
> Mr. TALLMAN: Yes, sir.
>
> The COURT: I direct that you to take the oath.

* * * * *

After this admonition, the witness took the oath, and the jury was excused. A hearing was held, in which it was determined that the witness could properly invoke the privilege against self-incrimination (J.A. 74–76). After being recalled, the jury was then instructed (J.A. 77; G. 20):

> The second witness called yesterday has been excused by order of the court. You are not to draw any inferences from that fact of any sort, either for or against the government or for or against any defendant now on trial.

Petitioner Parness contends that, through the actions of Tallman, the government laid the groundwork for an inference—that the stock was stolen—which was critical to a successful prosecution, particularly when the prosecutor, in his closing statement, stated that "Tallman went to jail for stealing the stock" (Pet. 31). However, Tallman was not asked any questions,

and the jury was never informed on what basis the witness was excused.[8] Moreover, there was plainly sufficient testimony by an employee of Bache & Co. that the stock was stolen (G. 62–66). Finally, we point out that the comment by the prosecutor that "Tallman went to jail for stealing the stock" came only after counsel for defendant Edwards had stated in summation that Tallman had been "arrested by the District Attorney's office for stealing the securities" and had served time in prison, and that the "thief ha[d] been punished" (Tr. 2993–2994).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

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[8] Counsel for petitioner requested the court explicitly to inform the jury on what basis the witness was excused. Finding this suggestion to be highly detrimental to the defense, the court refused to give such instructions unless all parties joined in the application. The application was later abandoned (G. 18–19).

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